83-1677

CASE NO. _____

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In The Supreme Court of the United States

OCTOBER TERM, 1983

SHERROD BROWN, SECRETARY OF STATE,
Appellant,

v.

JUANITA C. BRANDON, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT OF APPELLANT BROWN

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QUESTION PRESENTED

DID THIS COURT, IN THE FIRST PART OF THE TWO-PART TEST REGARDING THE CONSTITUTIONALITY OF A CONGRESSIONAL DISTRICT PLAN SET FORTH IN *KARCHER V. DAGGETT*, _____U.S._____ , 103 S. CT. 2653 (1983), REQUIRING A "GOOD FAITH EFFORT TO DRAW DISTRICTS OF EQUAL POPULATION", INTEND TO PRESCRIBE A WHOLLY OBJECTIVE TEST IN WHICH A DEMONSTRATION OF SMALL BUT AVOIDABLE POPULALATION VARIANCES REQUIRES REJECTION OF THE PLAN UNDER THAT PART OF THE TEST, EVEN IF SUCH VARIANCES OCCURRED DESPITE A *BONA FIDE* LEGISLATIVE EFFORT TO ACHIEVE PERFECT POPULATION EQUALITY?

LIST OF PARTIES

A. Parties opposing the Ohio Plan

Juanita C. Brandon, Rose Marie Higenbottam, Gary W. Starr, Raymond J. Wohl, Frank D. Castelli, John Kavlich, Richard R. Mackay, James J. Modarelli, Beryl E. Rothschild, Jeffrey H. Diredman, M. David Fredman, Leonard Davis, Alan Rutsky, Leonard Vannice, Richard Damiani, Thomas Longo.

B. Parties defending the Ohio Plan

Richard F. Celeste, Governor, Sherrod Brown, Secretary of State, Patrick A. Flanagan, Ann Butler, Judy Botwin, Barbara H. Boyd, Austin R. Cooper, Russell G. Fox, Cheryle Goode, Joyce Grimes, Terry Meister, Thaddeus Jackson, Eugene Pearson, Shirley Wilson, Steve Wortheim, Carol M. Finnan, John Holleran, Mary Ann Sikorsky, Nancy Toth, Robert J. Babcock, Susan Birmingham Brooks, David L. Dian, Kenneth Loeri, Robert Rodriguez, Karl Toth, Rual Vega, Dorothy Spiker.

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CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SHERROD BROWN, SECRETARY OF STATE,
Appellant,

v.

JUANITA C. BRANDON, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT OF APPELLANT BROWN

REPORTED DECISIONS BELOW

This action was adjudicated below in two decisions. The first is reported *sub nom. Flanagan v. Gillmor* at 561 E. Supp. 36, and was rendered May 25, 1982. The second decision, rendered January 30, 1984, (Appendix A), as modified February 13, 1984, (Appendix B), is the subject of this appeal, and is unreported.

GROUNDS FOR JURISDICTION

A. Nature of the Proceeding

This is a consolidated proceeding challenging as unconstitutional Ohio Rev. Code Ann. Section 3521.01, effective April 5, 1982, which establishes congressional districts. A three judge panel was convened pursuant to 28 U.S.C. Section 2284(a).

B. Entry of Judgment

Judgment was entered January 30, 1984 (Appendix A) holding that the Ohio plan did not conform to the population equality requirements of Article I, Section 2 of the Constitution. A clarifying order, issued February 13, 1984 (Appendix B), stated the court's intent in the January 30, 1984, order to enjoin any election under the Ohio plan. That order also denied Governor Celeste's motion for reconsideration. Appellant Brown filed his notice of appeal with the District Court on February 14, 1984 (Appendix C).

C. Jurisdiction

Appellate jurisdiction is conferred upon this Court by 28 U.S.C. Section 1253.

ARTICLE I, Section 2

This action is governed by the first paragraph of Article I, Section 2 of the Constitution, which provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

STATEMENT OF THE CASE

This action is a consolidation of two actions. The first was filed in the United States District Court for the Southern District of Ohio on February 16, 1982, by Patrick A. Flanagan and Ann Butler, on behalf of a class of all electors, *Flanagan v. Gillmor,* No. C-2-82-173. Plaintiffs alleged that the Ohio General Assembly had not enacted new congressional districts which were required to reflect new census data and to reduce Ohio's districts from twenty-three to twenty-one. The court was requested to establish the districts. A three judge panel was established on March 15, 1982, pursuant to 28 U.S.C. Section 2284(a).

On March 24, 1982, the Ohio General Assembly enacted a redistricting plan establishing twenty-one districts. The bill, H.B. 20, was signed by the Governor on March 25, 1982. Errors were later discovered in the bill, and a corrective measure, H.B. 953, was enacted and effective April 5, 1982. These bills amended Ohio Rev. Code Ann. Section 3521.01, in which the geographic boundaries of the districts are described. The district court has enjoined the holding of any elections in these districts.

On March 26, 1982, Juanita C. Brandon and Rose Marie Higenbottam moved to intervene as plaintiffs challenging the districting plan, which motion was granted April 6, 1982. On April 14, 1982, the motion of numerous supporters of the districting plan to intervene as defendants was granted. The court on that date also determined that the action should proceed on behalf of a class of all qualified electors. A stipulation of dismissal was filed April 19, 1984, dismissing four Ohio legislators as defendants. The Governor and Secretary of State remained as defendants in support of the plan. The original plaintiffs, Flanagan and Butler, subsequently declared their support for the plan, and were thereafter treated as defendants by the court.

The other action was filed March 26, 1982, in the United States District Court for the Northern District of Ohio by Gary W. Starr and others challenging the re-districting plan. Numerous persons were permitted to intervene as defendants on April 13, 1982. The action was shortly thereafter transferred to the Southern District and consolidated with the Flanagan case, *Starr v. Rhodes*, No. C-2-82-394.

Trial commenced April 19, 1982, and concluded April 21, 1982. Opponents of the plan made essentially two contentions, that the plan unlawfully diluted the voting strength of identifiable racial and religious groups, and that the plan's population inequalities offended Article I, Section 2. On May 25, 1982, the court rendered the first of two decisions, and held that the plan did not offend the constitution through racial or religious group vote dilution, 536 F. Supp. at 46. Regarding population variances between districts, the court noted that *Karcher v. Daggett* was pending before this Court,

and that it should withhold judgment pending this Court's decision, 526 F. Supp. at 50. The court authorized the 1982 congressional elections to proceed utilizing the H.B. 953 districts.

The district court's decision regarding population was rendered January 30, 1984 (Appendix A). In its review of the factual record, the court noted that Ohio's twenty-one districts depart from the ideal population of 514,173 by an average of .14%. The population variance between the largest and smallest district is .62%. Of the plans considered by the General Assembly, none had a lower maximum deviation, although two had lower average deviations. Thus, the General Assembly selected the best plan before it in terms of population variances. The Court concluded that the "enacted plan compares favorably to the other proposed plans", quoting its earlier decision at 561 F. Supp. at 42. The court also acknowledged that the plan was not a partisan gerrymander, for the Democratic Party had controlled the Ohio House of Representatives, the Republican Party had controlled the Ohio Senate, and the plan had been enacted with bipartisan support.

As to the nature of the process by which the plan was constructed, the court acknowledged that the legislative leadership was aware that there was no permissible *de minimus* population variance. Indeed, the record contains extensive and unrebutted testimony of legislators and others involved in the legislative process that a *bona fide* effort was made to achieve complete population equality. As stated at Appendix A, page A-14,

> Nothing in the Court's decision here today is meant to suggest that the Ohio

> legislature acted with invidious motives. The Court has no reason to doubt that the legislature conducted itself in good faith insofar as it strove to obtain an acceptable political solution to a thorny legal and political problem.

The court nevertheless held the redistricting plan to violate Article I, Section 2. The court's reasoning was straightforward. Relying on *Karcher v. Daggett*, _____ U.S. _____, 103 S. Ct. 2653 (1983), the court held that a two-part analysis must be conducted. The first part focused upon whether the state legislature had conducted a "good faith effort" to achieve perfect population equality. Absent such an effort, the second inquiry arises as to whether the state can justify the population variances. The court concluded that a good faith effort had not been made to equalize population, and that no adequate justification for variances had occurred.

It is the district court's reasoning regarding the good faith effort test which is erroneous and the subject of this appeal. The district court held that the issue of whether a good faith effort was made is wholly objective, to be determined solely from the plan as enacted. In the court's view, a demonstration that population variances could have been avoided equates with the absence of a good faith effort, regardless of the legislature's subjective policies and goals in fashioning the districts. As the court stated, Appendix A at A-14, 15:

> The absence of evidence of the subjective bad intentions of individual legislators is irrelevant. Such evidence is not re-

> quired to sustain the burden of proof set forth in the first prong of *Karcher*.
>
> * * * * * *
>
> Stated rather simply, when population variances can be reduced and those variances are not unavoidable, then there is an absence of good faith in the special sense in which *Karcher* and *Kirkpatrick* use that phrase.

This construction of the first part of the *Karcher* analysis, in effect, requires objective perfection (i.e., no "unavoidable" population variances), and renders wholly irrelevant any inquiry into the subjective matters such as whether a *bona fide* effort was made to achieve population equality. The result is to constitutionalize not an *effort* to achieve population equality but the actual *achievement* of perfect (or virtually perfect) equality.

Based upon its conclusion that population variances, although small, could have been avoided, and its conclusion under *Karcher's* second prong that the State had not justified the variances, the district court held that the plan offended Article I, Section 2. Shortly thereafter, supporters of the plan filed motions for reconsideration and postponement of redistricting, which were denied by an order entered February 13, 1984 (Appendix B). In that order, the court clarified the January 30, 1984 order as enjoining any election under the redistricting plan. Notices of appeal and motions for stay pending appeal were filed by the Governor, Secretary of State, Flanagan and Butler shortly thereafter. On February 17, 1984, the court, on motion, issued a stay of its injunction pending review by this Court.

THE COURT SHOULD SET THIS CASE DOWN FOR BRIEFS, ARGUMENTS, AND PLENARY CONSIDERATION.

In several important respects, this case differs markedly from *Karcher v. Daggett*, ——U.S.——, 103 S. Ct. 2653 (1983). Unlike *Karcher*, the Ohio General Assembly sought not to achieve a permissible degree of population variance, but rather to reduce variances as much as possible. This stands in stark contrast to the 1% goal employed in *Karcher*. Also, no attempt was made by the Ohio legislature to rely upon a level of statistical accuracy of census data as a permissible degree of variance. And, as noted above, variances in the Ohio plan cannot be traced to partisan gerrymandering, a major concern of the Court in *Karcher*. Lastly, unlike in *Karcher*, of all the plans before the Ohio General Assembly, the plan adopted was the *best* in terms of minimizing population variances, thereby evidencing the legislature's desire to comply with constitutional requirements.

But even though the factual record of this case differs from *Karcher*, this case presents an important issue regarding application of *Karcher:* Is a *bona fide* effort to achieve population equality unlawful merely because the resulting tiny population variances could have been avoided with greater care, time, and resources? Does the first prong of *Karcher* require virtual perfection, or an *effort* to achieve perfection? This is a critical distinction, for one may expect that state legislatures, after *Karcher*, will try – but often fail – to attain perfect equality. This case is surely the first of many in which a true effort to meet constitutional obligations fell somewhat short for reasons other than a disregard of the law. District courts need guidance on the question of whether subjective concerns – "good faith" – should play any role whatever in *Karcher's* first prong analysis.

An example of the absurd lengths to which the district court's harsh reading of *Karcher* may go is presented by this case. The record reflects that, to a large degree, census tracts were used in fashioning districts rather than smaller census blocks to avoid computational error. The court concluded that using blocks would have resulted in lesser population variances, that such variances therefore were objectively avoidable, and that therefore a "good faith effort" to achieve equality had not occurred. Thus, the court found that the Constitution requires the use of blocks rather than tracts. But surely such matters are not of constitutional import. If so, what other minor, mechanical decisions might constitute constitutional grounds to disapprove a plan? Does the Constitution require a state to devote huge personnel and computer resources to fashioning districts? Must a state employ tiny units to fashion a district, such as a voting precinct, apartment building, or even a single household? Must census data be verified by a field study to assure zero variances? Is every minor computational error, because "avoidable", meritorious grounds for suit? This Court in *Karcher* surely did not intend to hold that such perfection was constitutionally compelled, for perfection is impossible, *no* plan could withstand federal court review, and *no* plan would go unchallenged.

The district court's holding that the "good faith effort" test has no subjective element is also contrary to *Karcher* and previous cases using the phrase "good faith". That the Court in *Karcher* understood a "good faith effort" to permissibly achieve something less than perfection — to contain some avoidable variances — is clear from a passage appearing at note 10, 103 S. Ct. at 2663, "[N]or do we indicate that a plan cannot represent a good faith effort whenever a court can conceive of minor

improvements." But the district court has held exactly to the contrary, that any "avoidable" error, no matter how small, compels the legal conclusion that a good faith effort had not occurred.

The district court's construction of this Court's "good faith effort" test in *Karcher* as wholly objective clashes with numerous decisions of this Court in which the phrase "good faith" was intended to require an analysis, at least in part, of an actor's subjective motives. In *Harlow v. Fitzgerald,* ——U.S.——, 102 S. Ct. 2727 (1982), this Court overruled previous decisions which described the qualified immunity applicable to public officials sued for official acts as resting on the official's "good faith." The Court stated, at 102 S. Ct. 2737, "Decisions of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. . . .*Wood v. Strickland,* 420 U.S. 308. . . (1975) . . . The subjective component refers to 'permissible intentions.' " In newly rejecting a subjective inquiry into the official's motive, the Court recognized that the label "good faith" would no longer apply to an official's qualified immunity.

This Court recognized the subjective nature of the term "good faith" in another context. In *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968), the Court rejected a "good faith" test for awarding attorneys fees under Title II of the Civil Rights Act of 1964. The Court described the good faith test as a "subjective standard," 390 U.S. 401.

Cases employing the phrase "good faith effort" also demonstrate that such an effort may exist despite the failure to achieve complete objective results, and despite the actor's misconception of objective fact. In

Reardon v. Georgia, ––U.S.––, 103 S. Ct. 2064 (1983), the Court held that a State may not revoke probation where a defendant has failed to pay a fine despite a good faith effort to do so. The clear thrust of *Reardon* is that the result (not paying the fine) is permissible if a subjective inquiry reveals an honest intent and effort by the defendant to acquire assets to pay. The Court thus stated, at 103 S. Ct. 2064, note 10, that commentators are of the view that it is impermissible to revoke probation "when the probationer made *good faith efforts* to pay." (Emphasis added.)

Also illustrative of the subjective nature of a good faith effort is *Falls City Industrial, Inc. v. Vanco Beverages, Inc.*, 103 S. Ct. 1282 (1983). The Court recognized that one may defend a charge of unlawful price discrimination under the Robinson-Patman Act by demonstrating that the price was set as a "good faith effort" to meet a competitor's price, 103 S. Ct. at 1291. The defense is described in subjective terms, at page 1291, as based upon the "purpose of meeting the competitor's price," and upon "a reasonable belief that equally low prices were available." The true, objective facts were not dispositive in determining whether a good faith defense existed.

Numerous other recent cases illustrate that objective facts alone do not prove – or disprove – the presence of a good faith effort: *Ohio v. Roberts*, 448 U.S. 56 (1980) (defendants' right to confront witnesses at trial is not violated by government's use of a transcript of prior testimony of a witness whom the government failed to produce at trial despite a "good faith effort"); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (good faith defense of meeting a competitor's price to

charges of Robinson-Patman Act violations available even if actual facts later show belief to have been in error); *Scott v. United States,* 436 U.S. 128 (1978), (rejects argument that government must make a "good faith effort" to minimize interception of non-pertinent telephone conversations, holding that government's "motive" is not at issue).

There is no reason to conclude that this Court in *Karcher* and *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969), used the term "good faith effort" differently than in the above cases. This Court should therefore reject the district court's conclusion that an objective avoidability test applies to the State's effort to achieve equal population in congressional districts. Rather, the Court should hold that minimal population variances *are* permissible if they exist despite an honest and diligent attempt (a good faith effort) by the State to achieve population equality.

Should this aspect of the decision below be reviewed and reversed, there is little doubt that the Ohio districts will pass the first prong of the *Karcher* test, and therefore be held constitutional. Although the record reflects that the General Assembly had numerous permissible concerns in fashioning the plan, such as preserving cores of existing districts and protecting the districts of Ohio's only black and woman representative, the record is compelling that the population goal sought to be attained was perfect equality. No *de minimus* standard was regarded as adequate, in stark contrast to the 1% goal sought in *Karcher.* Also unlike in *Karcher,* no attempt was made by the legislature to rely upon a level of statistical accuracy of census data as a permissible degree of variance. And, as noted above, variances in the Ohio plan cannot be

traced to partisan gerrymandering. Rather, the General Assembly tried to attain perfect equality, and very nearly succeeded, the plan it adopted being the best before it in term of population variances. On this record, therefore, the error of the district court regarding what constitutes a "good faith effort" was critical to the resulting disapproval of the plan.

CONCLUSION

This case presents a major issue of law regarding congressional redistricting which is sure to be hotly litigated in numerous challenges to districting statutes. Rather than await the inevitable crunch of suits challenging new districts based upon 1990 census data, the Court should now define more precisely the role, if any, a subjective inquiry plays in *Karcher's* "good faith effort" test. Addressing this issue now may well result in less districting litigation in the future, and provide greatly needed guidance to state legislatures who will soon again be faced with the task of redistricting.

Accordingly, the Court is respectfully requested to set this case down for briefs, argument, and plenary consideration.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT BROWN

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Patrick A. Flanagan, et al.,

Plaintiffs

v.

Paul E. Gillmor, et al.,

Defendants

Case No. C-2-82-173

Gary M. Starr, et al.,

Plaintiffs

v.

James A. Rhodes, Governor, State of Ohio, et al.,

Defendants

Case No. C-2-82-394

Filed January 30, 1984

ORDER

In accordance with an opinion simultaneously filed herein and for the reasons therein stated, the Court concludes that plaintiffs have sustained their burden of proving that the Ohio Plan does not meet the "equal representation" standard of Article I, Section 2 of the

Constitution of the United States. A revised plan for Congressional redistricting which satisfies the requirement of Article I, Section 2 should be forwarded to this Court for review within forty-five (45) days of the date of this order.

BY ORDER OF THE COURT

/s/ Nathaniel R. Jones
Nathaniel R. Jones, Circuit Judge

/s/ Joseph P. Kinneary
Joseph P. Kinneary, District Judge

/s/ Robert M. Duncan
Robert M. Duncan, District Judge

January 30, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
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Patrick A. Flanagan, et al.,

Plaintiffs

v.

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Case No. C-2-82-173

Gary M. Starr, et al.,

Plaintiffs

v.

James A. Rhodes, Governor,
State of Ohio, et al.,

Defendants

Case No. C-2-82-394

Filed January 30, 1984

OPINION

Before Nathaniel R. Jones, Judge, United States Court of Appeals for the Sixth Circuit; Joseph P. Kinneary, United States District Judge; and Robert M. Duncan, United States District Judge.

Duncan, District Judge. This is our second occasion to judicially review the State of Ohio's Congressional redistricting plan (Ohio Plan) which effectively became law on March 25, 1982.[1] By an order dated May 25, 1982, we decided not to enjoin use of the plan for the upcoming Congressional election and stated that:

> We accordingly will hold in abeyance the issue of whether the Ohio plan satisfies the mathematical precision of *Kirkpatrick, supra [Kirkpatrick v. Preisler,* 394 U.S. 526, 533-34 (1969)] until we have the benefit of the Supreme Court's decision in the New Jersey case.

Flanagan v. Gillmor, 561 F. Supp. 36, 50 (S.D. Ohio, E.D. 1982).

On June 22, 1983, the Supreme Court of the United States decided the case *Karcher, Speaker, New Jersey Assembly, et al., v. Daggett, et al.,* ——U.S.——, 51 U.S.L.W. 4953 (1983). The Supreme Court held unconstitutional a congressional reapportionment plan enacted by the New Jersey Legislature after the 1980 census.

After receiving certain additional 1980 census material, reading counsels' memoranda, hearing argument, and carefully considering the Ohio Plan in light of the precedential congressional redistricting requirements set forth in the *Karcher* case, we determine that the Ohio Plan fails to meet the "equal representation" standard of Article I, Section 2 of the Constitution of the United States.

I

The facts of the case essentially remain unchanged from those set forth in *Flanagan, supra.* Rather than repeat them herein, a historical summary will do.

The Parties

Case No. C-2-82-173 was filed February 16, 1982, in this Court as a class action by named plaintiffs Patrick A. Flanagan and Ann Butler. They claimed that the Ohio General Assembly has failed to enact a congressional redistricting plan and requested the Court to establish a plan. Meanwhile the Ohio Plan was adopted. Those named plaintiffs now argue that the Ohio Plan is constitutional. (See Brief of Plaintiffs Patrick A. Flanagan and Ann Butler in Support of Present Ohio Congressional Redistricting Plan.)

Next, in March 1982, Juanita C. Brandon and Rose Marie Higenbottom moved to intervene in Case No. C-2-82-173 in a styled class action attacking the constitutionality of the plan. They vigorously continue the attack.

A number of Cuyahoga County residents were granted intervention as defendants. They support the lawfulness of the plan.

Gary W. Starr, Raymond J. Wohl, Frank D. Castelli, and John Kavlich filed an action in the United States District Court for the Northern District of Ohio seeking to have the plan declared unconstitutional (Case No. C-2-83-394). That complaint was amended and additional plaintiffs were added. A number of electors of the

21st Congressional District intervened as party defendants. The case was transferred to this District and consolidated with Case No. C-2-82-173. The *Starr* plaintiffs and defendants have not altered their positions concerning the constitutionality of the Ohio Plan.

The defendants in both cases are the current Governor and Secretary of the State of Ohio.

In the discussion hereinafter, plaintiff-intervenors in the *Flanagan* case and plaintiffs and plaintiff-intervenors in the *Starr* case will be referred to as plaintiffs. Defendants and defendant-intervenors in both cases will be called defendants.

The Ohio Plan

According to the 1980 census, the Ohio population is 10,797,630. The ideal population for each of Ohio's 21 Congressional districts is 514,173. All districts deviate from this ideal number. The average deviation from the ideal is .14%. Six districts have a percentage deviation of .20% or more; fifteen districts have a percentage deviation of .10% or more. District 1 has a population of 515,863, which is 1,694 above the ideal or +.33%. District 7 has a population of 512,706, 1,467 below the ideal or -.29%. The range of deviation between the two districts is .62%, referred to as the total percentage deviation.[2]

The General Assembly had other plans before it. None of them had a lower total percentage deviation, but two of them were better than the final plan regarding average percentage deviation. Earlier this Court

concluded that "the plan as enacted compares favorably to the other proposed plans." *Flanagan, supra,* p. 42.

Deviations from the Ideal

At the time of the enactment of the Ohio Plan, the Ohio House of Representatives was controlled by a majority of Democrats, while the Senate was controlled by a majority of Republicans. Obviously, a bipartisan accord was necessary to pass the legislation.

Senate Majority Leader Gillmor, Speaker of the House Riffe, and Representative Stinziano all testified, in essence, of their awareness of and sensitivity to a requirement that the districts be balanced in population and as close to the ideal number as possible.[3] However, Senator Meshel, Senate Minority Leader, testified that a plan could have been drawn "a lot more closely aligned in equal population." (Meshel Tr. 7-9.)

Edith Woodward, an employee of the Ohio Legislative Service Commission, worked on the preparation of the redistricting plan. She stated that her effort was to plan each district to have a population of 514,173 or as close to that figure as practicable. She was not told by any member of the General Assembly that there was any permissible fixed deviation. However, as we stated in our earlier opinion, Ms. Woodward admitted that with more time a better effort to achieve precise mathematical equality could have been made. *Flanagan, supra,* p. 42.

For the most part larger unit census tracts rather than smaller census blocks were used in preparation of the plan. Use of census blocks could have reduced the extent of a number of variances from the ideal.

The Ohio General Assembly's efforts to achieve mathematical parity were effected by a number of influences. The omnipresent reality of political compromise surely had a causal relationship to the result. The legislature, in enacting the plan, made efforts to "preserve the core of existing Congressional districts, to achieve relative geographic compactness, and to preserve the political complexion of the districts of incumbent members of the Congressional delegation." *Flanagan, supra,* p. 42. The Ohio Plan was also designed to maintain favorable district constituencies for Representative Louis Stokes, Ohio's only black member of Congress, and Representative Rose Oakar, the only woman member of Congress from Ohio.

In our earlier opinion we found that the legislature could have attained greater precision, and that the variances from the numerical ideal were not shown to be unavoidable. *Flanagan, supra,* p. 47.

Race-Religion

Plaintiff-intervenors contended that the Ohio Plan was purposely designed to dilute the voting strength of Ohio's black citizens. The evidence focused on the black populations in Franklin, Hamilton and Cuyahoga Counties. The May 25, 1982 opinion thoroughly discusses this issue. *Flanagan, supra,* pp. 42-46. In sum, we determined that the evidence fails to establish an invidiously discriminatory racial motive accounting in whole or in part for the districts' boundaries. We previously had occasion to note that if the General Assembly, in enacting a redistricting plan, uses racial demography as a factor in considering the political

complexion of a district, and the result is a significant diminution of black voting power, we would be concerned about the lawfulness of such a plan. Under such circumstances a permissible inference of purposeful discrimination could be drawn. *See Flanagan, surpa,* n.20.

Finally, we earlier decided that there were insufficient proofs that in dividing the 19th from the 21st District in part between the two census tracts which together include University Heights, the General Assembly was animated by a purpose to dilute the ability of voters to organize along religious or racial lines. *Flanagan, supra,* p. 46.

II

As this Court noted in its prior opinion and as the Supreme Court noted in *Karcher,* Article I, Section 2 establishes a high standard of "justice and common sense" for the apportionment of congressional districts: "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964) (footnote omitted). This principle of "equal representation" was defined with greater specificity in the seminal case of *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969) when the Supreme Court was faced with a challenge to a Missouri redistricting plan.

In finding the deviations in *Kirkpatrick* unacceptable, the Supreme Court noted that

> [T]he "as nearly as practicable" standard requires that the state make a good faith effort to achieve precise mathematical equality. . . .
>
> Unless population variances among congressional districts are shown to have resulted despite such effort, the state must justify each variance, no matter how small.

Kirkpatrick, supra, pp. 530-31.

Therefore, under the rule enunciated in *Kirkpatrick,* "only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown. . . ." are permissible. *Id.* at 531.

Since the Supreme Court's decision in *Kirkpatrick,* the need to satisfy the mandate of Article I, Section 2 for mathematical equality among districts has engendered additional litigation. Without engaging in an exhaustive analysis of all the precedents concerning reapportionment of congressional districts, the Court notes that the most recent plurality decision of the Supreme Court in *Karcher v. Daggett* provides this Court with additional guidance on this question.[4] In *Karcher,* the Supreme Court set forth the analysis which must be engaged in by a court reviewing the constitutionality of a redistricting plan.

> First, the court must consider whether population differences among districts could have been reduced or eliminated altogether by a good faith effort to draw

> districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good faith effort to achieve equality the state must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

Karcher, supra, p. _____.

As is evident from the above-quoted language, *Karcher* mandates that courts engaged in a constitutional review of congressional redistricting plans employ a two-part analysis. First, the court must determine whether plaintiffs, opponents of the plan, have sustained their burden of proving population variances which could have been reduced or eliminated by a good faith effort. If, and only if, the plaintiff sustained this initial burden, must the Court move on to the second inquiry or level of analysis. At this stage, the state must bear the burden of proving that "each significant variance" was necessary to achieve some legitimate goal. *Id.* For the sake of clarity, the Court will attempt to elucidate what is required under each prong of *Karcher's* two-part analysis.

A. Good Faith

The first prong of the *Karcher* test requires this Court to make a determination as to whether "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Karcher, supra,* p. _____.

In determining what evidence satisfies this first prong of the *Karcher* analysis, this Court has struggled with the "good faith" language of *Karcher* and *Kirkpatrick*. The opponents of the Ohio Plan contend that plaintiffs meet their burden by showing that population variances among districts were not unavoidable and that the variances could have been reduced or eliminated altogether by a good faith effort. Conversely, proponents of the Ohio Plan argue that persons challenging the plan bear the burden of showing that the defendant acted without good faith or with some bad or invidious motive. This Court believes that the opponents of the plan have correctly analyzed *Kirkpatrick* and its progeny.

It is true that at first blush the standard for judging the constitutionality of redistricting plans under Article I, Section 2 appears exacting, even harsh for those attempting to draft constitutionally sound redistricting plans. Nonetheless, it would seem that at least with respect to the first prong of the *Karcher-Kirkpatrick* test numerical considerations, *i.e.*, mathematical equality, are of primary significance.

The primary importance of mathematical considerations in congressional redistricting[5] is apparent when one reads the line of cases concerning apportionment in state legislative districts. In explaining the distinction between

apportionment of congressional as opposed to state legislative districts, the Supreme Court has had occasion to note that

> Thus, whereas population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, Section 2, broader latitude has been afforded states under the equal protection clause in state legislative redistricting.

Mahan v. Howell, 410 U.S. 315, 322 (1973). *Accord Gaffney v. Cumming*, 412 U.S. 735 (1973).

In *White v. Weiser*, 412 U.S. 783, 792 (1973), the Supreme Court reaffirmed the distinction between challenges to congressional districts and challenges to state districts. Interestingly enough, the defendants in *Weiser* also argued that absent proof of invidiousness, population variances did not violate Article I, Section 2. The court rejected this argument and "reiterated that the *Wesberry*, *Kirkpatrick* and *Wells* line of cases would continue to govern congressional reapportionments, although holding that the *rigor of the rule* of those cases was inappropriate for state reapportionments." *Weiser, supra*, p. 793.

This Court believes that support for the exacting definition of "good faith" may initially be found by contrasting the analysis used in those cases challenging state districts with the more stringent analysis used in cases involving congressional districts.

As has already been noted, the proponents of Ohio's plan seem to maintain that the numerical strictures of

Kirkpatrick and *Karcher* can be avoided in this case because there is evidence that the legislature acted in subjective good faith. In support of their contention, proponents argue that a number of legislative leaders testified unequivocally that the plan in question was in their opinion a reasonable legislative compromise and that efforts were made to achieve population equality. More specifically, the proponents of the Ohio Plan, in support of their subjective good faith argument, contend that the New Jersey Plan, held to be unlawful by the Supreme Court in *Karcher,* is in some significant respects dissimilar to the Ohio Plan. There is no evidence that the Ohio General Assembly enacted the plan on the premise that a deviation lower than the statistical imprecision of the decennial census was the "functional equivalent of mathematical equality" as the District Court found in *Daggett v. Kimmelman,* 535 F. Supp. 978, 982-983 (N.J. 1982).

Nothing in the Court's decision here today is meant to suggest that the Ohio legislature acted with invidious motives. The Court has no reason to doubt that the legislature conducted itself in good faith insofar as it strove to obtain an acceptable political solution to a thorny legal and political problem. Clearly, that solution was a compromise with which no one was completely enamoured but which dissatisfied the fewest number of people. However, the absence of evidence of the subjective bad intentions of individual legislators is irrelevant. Such evidence is not required to sustain the burden of proof set forth in the first prong of *Karcher.*

The Court concedes that were the question of "good faith" capable of resolution by use of a standard less exacting than that set forth in *Karcher* and *Kirkpatrick,*

we would arguably have a closer case. However, this Court concludes, and is not alone in doing so, that good faith as that term is used in *Karcher* and *Kirkpatrick* is tantamount to a term of art having a special meaning. See *Doulin v. White,* 528 F. Supp. 1323, 1328-29 (E.D. Ark. 1982).[6] Stated rather simply, when population variances can be reduced and those variances are not unavoidable, then there is an absence of good faith in the special sense in which *Karcher* and *Kirkpatrick* use that phrase.

In the case at bar, opponents of the Ohio Plan sagely note that this Court has already concluded that greater precision was possible than that which was achieved by the Ohio Plan. *Flanagan, supra,* p. 47. More specifically, this Court concluded that "the variances were not shown to be unavoidable." *Id.* The court went on to note that this failure to achieve mathematical equality could be attributed to a number of factors including the process of legislative compromise, the unit of measurement used,[7] and the hurried manner in which the plan was adopted. *Id.* at 42.

This Court concluded in its prior opinion and today reaffirms the conclusion that had the legislature exercised the kind of good faith effort to achieve population equality required by the Supreme Court, it would have been able to come significantly closer to that goal than it did. While this Court has no doubt that the legislature was trying to do something in good faith, achieving population equality was not the sole focus of legislative efforts. More specifically, the difficulty arose in this case, as in many others, when the legislature tried to achieve population equality while concurrently pursuing secondary goals. Pursuit of secondary goals will often

result in variances where such variances might otherwise not exist. That is precisely what appears to have happened in this case. Specifically, Witness Tilling testified as follows:

> Q. Would it have been possible to draw 21 congressional districts with exactly 514,173 people in each of them, using the data that you had available?
>
> A. Not without seriously disrupting the communities of interest which you have asked me about before. They would be decimated by such a process.
>
> Q. But it would have been possible by ignoring that? Is that your testimony?
>
> A. Basically, I guess I am saying that you can do one or the other.
>
> Q. Then it would also have been possible to draw a plan that varied by less than 3100 people among the districts, wouldn't it?
>
> A. Yes, again, if you are willing to disregard communities of interest and census tract boundaries, you could, indeed, do that.

(Tilling Tr. 127-128.) This testimony suggests that mathematical equality was sacrificed for the pursuit of secondary goals. While the Supreme Court has conceded that there may be permissible variances, such

variances must be shown by the defendants to be the result of the pursuit of some legitimate goal or policy. Defendants have failed to make the requisite showing in this case. Moreover, this showing is irrelevant to whether the good faith standard of *Karcher* has been satisfied.

Before moving on to an analysis of the secondary goals proffered as basis or justification for population variances in this case, one final related matter deserves to be addressed. The proponents of the Ohio Plan argue that drafters of a redistricting plan may still be held to have acted in good faith even though they pursued secondary political goals. This argument is little more than a restatement of prior arguments. That is, the proponents appear to be arguing that the burden should not shift to them even though there are "not unavoidable variances" which resulted from the pursuit of legitimate secondary goals provided they are found to have acted in subjective good faith. This argument is rejected by this Court.

Moreover, the Court believes the defendants misconstrue the relevance of the pursuit of secondary non-numerical goals to the question of whether the plaintiffs have met their burden under the first "good faith" prong of the *Karcher* test. The pursuit of secondary non-numerical goals is irrelevant to the first prong "good faith" inquiry as that inquiry has been defined at length in the preceding pages. Generally, consideration of such goals only becomes relevant after the issue of good faith has been resolved and the burden has shifted to the state to justify "not unavoidable variances." The language of *Karcher* supports this conclusion.

> We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives. . . .Nevertheless the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases . . . .

Karcher, supra, p. _____.

In this same vein, in considering the legitimacy of the particular secondary goal of preserving political subdivisions, the *Karcher* court noted that "while perfectly permissible as a secondary goal, [pursuit of that political goal] is not a sufficient excuse for failing to achieve population equality without the specific showing described *infra* . . . ." *Karcher, supra,* p. _____, n.5.

Therefore, while the pursuit of secondary objectives is certainly permissible after *Karcher,* the presence or absence of such goals does little to militate in favor of finding good faith where the Court has found variances which are not unavoidable. Secondary goals must remain secondary; the primary goal must be equality. The pursuit of legitimate goals may be proffered as justification for "not unavoidable variances," however. In that regard, proof of the pursuit of secondary non-numerical goals is more properly considered as part of the state's proof after the burden has shifted.

B. Legitimate Secondary Goals

Upon a determination that a state legislature did not formulate a congressional redistricting plan containing only those variances which were unavoidable despite a good faith effort to achieve population equality, the burden shifts to the state to justify each significant variance. The state must show that a specific deviation from the ideal is necessary in order to achieve a legitimate state policy goal and that the policy is applied consistently throughout the plan. This second level of inquiry requires a three-part analysis with respect to each district which significantly deviates from the ideal. The state must show (1) that a variation resulted from the legislature's attempt to carry out a legitimate state policy; (2) that the variation was necessary in order to effectuate the policy; and (3) that the policy was applied consistently throughout the state.

There is language in *Karcher* to the effect that "the state must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher, supra,* p. _____. The Court does not indicate what is meant by a "significant variance."

Karcher's recent language is somewhat different from the language previously used by the Supreme Court in *Kirkpatrick.* In *Kirkpatrick* the Supreme Court stated that "the state must justify each variance, no matter how small." *Kirkpatrick, supra,* pp. 530-31. *Karcher,* on the other hand, requires that state to bear the burden of justifying "each significant variance." *Karcher, supra,* at _____.

After giving this matter careful consideration, we interpret the language of *Karcher* as follows: In determining whether a variance is significant, the court must consider the total plan, the range of the variances from the ideal, and the nature of the goal or goals of the legislature.

This Court's interpretation of significant, as that term is used in *Karcher,* is supported by the following language from that opinion:

> The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the state's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

Karcher, supra, p. _____.

Given the arguable uncertainty surrounding the meaning of the term "significant variance," and in order to adhere to the true spirit of *Karcher,* the state would be well-advised to be prepared to set forth a basis for each variance.

The Supreme Court has acknowledged that a state may have any number of legitimate concerns which will serve to justify small variances in a redistricting scheme. A state's interest in making districts compact, in respecting municipal boundaries, in preserving cores of prior districts and in avoiding contests between incumbent representatives, have been set forth in *Karcher* as legisla-

tive policies which, if applied consistently, and in a non-discriminatory manner, could justify population deviations. *Karcher, supra,* p. _____.[8]

1. Preserving Minority Voting Strength

Preservation of minority voting strength is another example of a permissible state policy which may justify variances from the ideal. A state's desire to preserve existing minority voting strength is the logical outgrowth of the prohibition against the dilution of that voting strength. The Court has held it constitutionally impermissible to draw congressional districts in a manner which purposely dilutes the voting strength of an identifiable minority. The decision to preserve existing minority voting strength has not been specifically ruled on in the context of a challenge based upon a failure to reach population equality.

In *Karcher,* however, the Supreme Court indicated that the legislative policy of preserving minority voting strength against the potential of dilution provides a legitimate justification for a population deviation, where a "causal relationship" exists between that policy and the deviation. The District Court, in that case, found no such "causal relationship between the goal of preserving minority voting strength . . . and the population variances." *Daggert v. Kimmelman,* 535 F. Supp. 978 (D. N.J. 1982). Observing that the record was "completely silent" on that relationship, the Supreme Court concluded that the District Court's findings were not "clearly erroneous." In so concluding, however, the Supreme Court suggested that the policy of preserving minority voting strength itself is a legitimate one. That

policy therefore provides a legitimate justification for a deviation where the facts indicate that it is causally related to the deviation.

The legitimacy of the preservation of minority voting strength, moreover, has been addressed in connection with the congressional reapportionment of districts subject to the Voting Rights Act of 1965. In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1976), the Court addressed the issue whether racial considerations could be intentionally used in an affirmative manner when reapportioning congressional districts. The Court held that racial criteria may be used in redistricting plans in order to maintain non-white voting strength. *Carey, supra*, at 165-168.

If a state may explicitly use racial criteria in drawing districts in a manner which will maintain the minority voting strength of a community, then, as *Karcher* indicates, it follows that the state may also draw districts in a manner which will preserve minority voting strength where it already exists.

While the state in this case did not attempt to justify the Ohio Plan by arguing the preservation of minority voting strength, the state did claim to justify certain variances on the gounds that it was creating "safe" districts for Ohio's only black Representative and Ohio's only woman Representative. The preservation of safe congressional districts for Representatives Stokes and Oakar in the 21st and 20th districts, respectively, is not only an outgrowth of a policy seeking to preserve minority (protected class) voting strength, but also of an analogous policy of preserving minority representation. Having

such representation is important to Ohio's delegation in the Congress. Therefore, the state's goal of preserving safe districts for Representatives Stokes and Oakar is permissible as a justification for necessary small deviations in district population.

Although such a goal is legitimate, the burden remains with the state to show with particularity that certain deviations in the plan were necessary to achieve that goal, and that that goal was applied in a consistent manner throughout the state. There is no evidence before the Court which states, other than in general and conclusory terms, that the only way the state could have achieved the goal in question was to have the variances that appear in this plan.

The Court hastens to add that if upon further consideration of this plan the General Assembly is persuaded, and the state can demonstrate to this Court, that small deviations in connection with this legitimate goal are necessary, then such deviations would certainly comport with the standards of *Karcher*.

2. Polical Fairness

Defendants strongly urge upon this Court other justifications for the variances found in the Ohio Plan. Specifically, proponents of the plan argue that to some extent, the population variances were caused by a legislative intent to be politically fair. Generally speaking, it is hard to quarrel with the legitimacy of such a goal. Certainly insofar as this goal reflects a legislative intent to prevent gerrymandering, it is legitimate. *Karcher, supra,* p. _____ n.6. Before the Court may accept this goal as a legitimate justification for variances, however, the state

must relate with particularity how each variance furthers such a goal, *i.e.*, the necessity requirement of *Karcher*. The state must further sustain the burden of demonstrating consistent application of the concept of political fairness.

Once again, the record in this case reveals that the state has merely asserted in a general way that political fairness justified the variances present in the Ohio Plan. Stated another way, the state has failed to carry its burden under the second prong of the *Karcher* analysis.

3. Political Compromise

This Court is well aware that the Ohio Plan was enacted only after a political stalemate between the parties had been resolved by a dedicated conference committee. Apart from their contention that the Ohio Plan is politically fair, proponents of Ohio's plan appear to be arguing that in order to pass the Ohio Plan, political compromises or concessions from both political parties were necessary. Proponents seem to further argue that the variances in this case can be explained and justified under *Karcher* because the Ohio Plan was the result of such a compromise.

The Court concludes that the political compromise which occurred in this case was not a prospective goal but rather was a retrospective realization of what happened. While political fairness may be a legitimate goal under *Karcher, see* discussion *supra*, political compromise in an effort to achieve that goal is not a permissible consideration under either the first or the second prong of *Karcher*. There simply can be no such thing as a consistently applied policy of *ad hoc* political compromise.

4. Communities of Interest

The defendants seek to justify variances in Districts 11 and 19, and perhaps others, by stating that the legislature was concerned with preserving certain interests. We note that the court in *Kirkpatrick* specifically found that the attempt to "avoid fragmenting areas with distinct economic and social interests, thereby diluting the effective representation of those interests in Congress" was an impermissible justification. *Kirkpatrick, supra,* p. 533.

The defendants have not even indicated to the Court what communities of interest they sought to preserve in Districts 11 and 19, much less what interests were being protected with respect to other districts. There has been no evidence presented that the deviations in any district's population was causally related to a policy of preservation of community interests. Even if defendants have strong state policy reasons to protect certain communities of interest, the defendants must still show that those policies could be effectuated only by permitting small variances and that, with respect to a certain type of interest, the policy was implemented and consistently applied throughout the state.

5. Other Legitimate Goals

The legitimate policy interests enumerated in *Karcher* include making districts compact, respecting municipal boundaries, preserving the areas of prior districts, and avoiding contests between incumbent Representatives. In discussing secondary goals in this opinion, we do not intend to imply that no other secondary goals are available to a state to justify small variances. Once again, however, it should be emphasized

that if asserted, legitimate policy interests must be proved by the state in accordance with the standard set forth above.

To summarize, we find that the defendants have not sustained "the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher, supra,* p. _____.

III

The primary thrust of *Karcher* is the Supreme Court's insistence that the "equal representation" standard of Article I, Section 2 requires that congressional districts be apportioned to achieve population equality as nearly as is practicable. We have concluded that with a good faith effort the Ohio General Assembly practicably could have significantly reduced both the average variations from the ideal as well as the total percentage deviation. We reject a standard to determine primary good faith requiring a judicial attempt to hone in on the subjective mentality of a bicameral multi-member legislative authority. What the body did, rather than what certain of its leaders said that they were trying to do, is a far more appropriate and realistic inquiry in this matter. It is rather obvious, in this case, that well-intentioned but secondary considerations significantly account for the nature and extent of the variances.

In the first instance a state cannot account for deviations from the ideal district by factoring in well-meant secondary goal considerations, and then argue that plaintiffs have failed to show a lack of good faith in getting as close as practicable to the ideal number. If

this were the case, a state would never shoulder the burden of justifying significant variances resulting from the implementation of secondary goals. *Karcher* holds otherwise. Stated another way, if variances were avoidable, implementation of secondary goals cannot make them unavoidable. Moreover, while the New Jersey secondary goals were arguably different from the Ohio goals, in New Jersey, as in this case, the state failed to bear the burden of proving that each significant variance between districts was necessary to achieve the legitimate goals. Additionally, in both the New Jersey and Ohio Plans the secondary goals, which otherwise may have had the promise of legitimacy, fell short of the mark for the reason that the state failed to show that the goal or policy was consistently implemented state-wide. Accordingly, this Court finds that the Ohio Plan, like the New Jersey Plan, fails to meet the standard of Article I, Section 2 of the Constitution of the United States.

IV

This Court is firm in its appreciation of the fact that congressional redistricting is a duty of the Ohio General Assembly. Although *Karcher* is to a degree illuminating as to the requirements for constitutionality, redistricting remains a very difficult undertaking for the legislature. Important political considerations are at stake. Nevertheless, it is our expectation that the General Assembly can, with dispatch, present to this Court a revised plan, which comports with the Constitution of the United States. Nothing in this opinion is meant to suggest that the present plan is not amenable to revision or that it is not possible to satisfy the *Karcher* and *Kirkpatrick* requirements by eliminating variances between districts in the present Ohio Plan.

If, and only if, the General Assembly cannot meet its obligation, will this Court be required to provide a plan.

Accordingly, defendants are ORDERED to present the matter to the Ohio General Assembly for its consideration and preparation of a revised plan for congressional redistricting which satisfies the requirements of Article I, Section 2 of the Constitution of the United States and other requirements of law. In the event that a plan is not forwarded to this Court for analysis and consideration within 45 days of the date of this order, further action will be taken by the Court.

Nothing in this opinion should be construed as prohibiting the General Assembly from extending the February 23 deadline for filing petitions of candidacy for Congress.

[1] In 1981 a Congressional redistricting plan, House Bill 20, was introduced in the Ohio House of Representatives. After the House passed the bill on January 27, 1982, the Senate passed an amended version on February 17, 1982. At that time the legislature was facing a statutory time deadline of March 24, 1982, when petitions of candidacy for Congress had to be filed. A compromise was reached by a Conference Committee; the compromise bill was enacted and signed into law by the Governor on March 25, 1982. The enactment contained a provision postponing the petition-filing deadline until April 5, 1982. Subsequently, because of a number of errors in H.B. 20, a corrective measure, H.B. 953, was enacted and became effective April 5, 1982.

[2] Certain factual similarities between the New Jersey case and the Ohio case are undeniable. In the New Jersey case, following the 1980 census, New Jersey lost one seat in the House of Representatives. After two unsuccessful attempts at redistricting, the legislature for the State of New Jersey convened and "swiftly" passed a bill introduced by Senator Feldman, president pro tem of the State Senate. Under the Feldman Plan, as the New Jersey plan came to be known, the average variance among districts was .1384% or about 726 people. Under the Ohio Plan, which was also drafted after the 1980 census, the average variance among districts was .14%. In the New Jersey Plan, the variation between the most and least populous districts was .6984% or 3,674 people. In the Ohio Plan, the population difference between the largest and smallest districts was 3,161, *i.e.*, a maximum variation of .62%.

[3]For example, Senator Gillmor testified: (Gillmor Tr. 4)

> Q. Did you understand that the only variances from the mathematical equality or zero deviation are those that are unavoidable despite a good faith effort to achieve absolute equality or for which justification is shown?
>
> A. It was our feeling that we had to get down to zero if it were possible, yes.

However, Gillmor also stated: (Gillmor Tr. 4)

> Q. I take it then that your answer is yes, the necessity for legislative compromise did have an effect on efforts to achieve absolute equality among the districts. Is that correct?
>
> A. I suppose it may have.

[4]This Court has already indicated that there are a number of similarities between the Ohio and the New Jersey Plans. Despite these similarities, the proponents of the Ohio Plan argue that there are dissimilarities between the two cases that allow the Ohio Plan to withstand constitutional scrutiny. Specifically, defendants in this case argue that unlike the New Jersey case, where the legislature had a plan with lower deviations to choose from, the Ohio legislature in this case chose the plan with the lowest deviation. While it is true that the Supreme Court in *Karcher* mentions the fact that the New Jersey legislature had before it other plans with smaller devia-

tions, that fact was one fact among many which led the court to conclude that the deviations were not unavoidable; it was not conclusive. Therefore, the fact that there were no other plans under consideration by the Ohio legislature which contained significantly lower deviations does not mean that the plan that was adopted contained deviations which were unavoidable.

[5] The primary significance of mathematical equality was apparent even before the Supreme Court decided *Karcher* as is evident by the discussion which follows. *See* pp. 11-13, *infra*. Moreover, this Court in its prior opinion acknowledged the primary importance of numerical considerations when it noted that under *Kirkpatrick* a finding that a variance is not unavoidable disposed of the issue of good faith. *See Flanagan, supra*, p. 47.

[6] In *Doulin* the court similarly rejected attempts by proponents of Arkansas' redistricting plan to persuade the court that good faith meant subjective good faith. This Court finds the reasoning of that court persuasive.

It is possible to argue, of course, that if the plaintiffs' burden is limited to showing "variances which can be reduced and which are not unavoidable" then the term "good faith" is rendered meaningless. This Court believes that the definition of good faith herein adopted is entirely consistent with the Supreme Court's opinion in *Karcher*. While the conclusion that the term good faith is in essence synonymous with proof that population variances could have been reduced and were not unavoidable may render the words "good faith" surplusage, this conclusion does not render the term "good faith"

meaningless. Rather it results in a greater specificity of meaning for that term. In this regard it can no longer be the subject of dispute that "at some point. . ., population variances *do* import invidious devaluation of an individual's vote. . . ." *White v. Weiser,* 412 U.S. 783, 792 (1973). This language seems to buttress this Court's conclusion regarding the "good faith" language in the line of cases beginning with *Kirkpatrick* and ending with *Karcher.*

[7]This Court concluded in its original opinion that "census tracts are the larger unit of measurement and census blocks are the smaller. By utilizing census blocks, a greater degree of mathematical precision was possible." *Flanagan, supra,* p. 42. While it is true that the Court also concluded that "[t]he evidence at trial was inconclusive on the issue of whether greater precision could have been obtained solely by reallocation of census tracts . . ." *Id.,* at 42, n.5, the failure to make more frequent use of the smaller unit of measure was one factor which led to the Court's conclusion that the variances were not unavoidable.

[8]The court in *Karcher* also noted that some of the policies presented by Missouri in *Kirkpatrick,* which are not presented in this case, could be legitimate justifications for variances. District-to-district differences in the number of eligible voters, or projected population shifts, may in some instances stand.

> We rejected [Missouri's] arguments not because those factors were impermissible considerations in the apportionment process, but rather because of the size of

> the resulting deviation and because Missouri '[a]t best made . . . haphazard adjustments to a scheme based on total population,' made 'no attempt' to account for the same factors in all districts and generally failed to document its findings thoroughly and apply them 'throughout the state in a systematic, not an ad hoc manner.'

Karcher, supra, p. _____ (citations and footnote omitted.)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Patrick A. Flanagan, et al.,

Plaintiffs

v.

Paul E. Gillmor, et al.,

Defendants

Case No. C-2-82-173

Gary M. Starr, et al.,

Plaintiffs

v.

James A. Rhodes, Governor,
State of Ohio, et al.,

Defendants

Case No. C-2-82-394

Filed February 13, 1984

ORDER

On February 10, 1984, this Court convened for purposes of hearing argument on a number of recently filed motions in this case.

From the bench, the Court denied the motion of the original plaintiffs for a stay pending resolution of their motion to amend this Court's January 30, 1984 order. The Court also denied the original plaintiffs' motion to amend the January 30, 1984 order and further denied the defendant Governor's motion for clarification and reconsideration of this Court's January 30, 1984 order.

Following the arguments of counsel, the Court has reconsidered its ruling on the defendant Governor's motion for clarification. More specifically, the Court understood counsel to argue at bar that there is some uncertainty concerning whether this Court's January 30, 1984 order operates to enjoin the State from conducting the 1984 primary and general elections using the 1982 Redistricting Plan.

This Court's order of January 30, 1984 specifically held that the

> plaintiffs have sustained their burden of proving that the Ohio Plan does not meet the "equal representation" standard of Article I, Section 2 of the Constitution of the United States. A revised plan for Congressional redistricting which satisfies the requirement of Article I, Section 2 should be forwarded to this Court for review within forty-five (45) days of the date of this order.

The Ohio Plan is unconstitutional and its use for the 1984 election is enjoined.

In this regard the motion of defendant Secretary of State for an order authorizing the conduct of the 1984 primary and general elections upon congressional districts enacted in 1982 is not well taken and is accordingly DENIED.

The only matter remaining for this Court's consideration is the defendant Governor's request for a stay. During argument, counsel for defendant Governor did refer to a stay pending appeal. More specifically, defendant Governor's motion reads as follows:

> Assuming this Court does not reconsider its decision and that, further, its Opinion and Order, dated January 30, 1984, does enjoin the holding of the 1984 Congressional elections from the present districts, this Defendant respectfully submits that such Order should be stayed to allow proper pursuit of an appeal of the decision.

We construe the foregoing as a motion for a stay. The Court does not believe that a motion for a stay pending appeal is properly before it at this time. The defendant's motion for a stay is therefore DENIED without prejudice.

So ORDERED.

/s/ Nathaniel R. Jones
Nathaniel R. Jones, Circuit Judge

/s/ Joseph P. Kinneary
Joseph P. Kinneary, District Judge

/s/ Robert M. Duncan
Robert M. Duncan, District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK A. FLANAGAN, et al.,

Plaintiffs

v.

PAUL E. GILLMOR, et al.,

Defendants.

Case Nos.
C-2-82-173 / C-2-82-394 / C-2-82-441

Judges Duncan, Jones, and Kinneary

NOTICE OF APPEAL
BY SECRETARY OF STATE
SHERROD BROWN

Notice is hereby given that Defendant Sherrod Brown, Secretary of State of Ohio, hereby appeals to the United States Supreme Court from the Opinion and Orders entered in this action on January 30, 1984, and February 13, 1984. This appeal is taken under 28 U.S.C. Sections 1253 and 2284(a).

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
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Supreme Court, U.S.
FILED
MAY 11 1984
ALEXANDER L. STEVAS
CLERK

Nos. 83-1677, 83-1678, 83-1679

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SHERROD BROWN, SECRETARY OF STATE,
Appellant,

v.

JUANITA C. BRANDON, et al.,
Appellees.

RICHARD F. CELESTE, GOVERNOR OF OHIO,
Appellant,

v.

JUANITA C. BRANDON, et al.,
Appellees.

PATRICK A. FLANAGAN and ANN BUTLER,
Appellants,

v.

JUANITA C. BRANDON, et al.,
Appellees.

On Appeal From The United States District Court For The Southern District of Ohio

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MOTION OF APPELLEES JUANITA C. BRANDON AND ROSE MARIE HIGENBOTTAM TO AFFIRM

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SUPREME COURT OF THE UNITED STATES

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Nos. 83-1677, 83-1678, 83-1679

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Appellees Juanita C. Brandon and Rose Marie Higenbottam, pursuant to Rule 16, of the Rules of the Supreme Court of the United States, move to affirm the order of the District Court concluding that the Ohio congressional districting plan fails to meet the "equal representation" standard of Article 1, § 2 of the Constitution of the United States. The questions raised in these appeals are so unsubstantial as not to warrant further argument.

The jurisdictional statements filed by appellants have fully set forth the questions presented, the reported decisions below, a statement of the jurisdictional grounds and the constitutional provisions and statutes involved. Those matters need not be repeated here.

ARGUMENT

The application by the Court below of this Court's holdings in *Kirkpatrick* v. *Preisler*, 394, U.S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969) and *Karcher* v. *Daggett*, — U.S. —, 77 L. Ed. 2d 133, 103 S. Ct. 2653 (1983), is so clearly correct as to warrant summary affirmance by this Court. Applying the standards enunciated by this Court in *Kirkpatrick* and *Karcher*, the three-judge panel correctly concluded that the population variances among the congressional districts in the Ohio districting plan could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population, and that the proponents of the plan, appellants herein, failed to meet their burden of proving that the variances were necessary to achieve some legitimate goal. In their efforts to overturn the decision of the Court below, appellants have ignored and at times misstated the Court's careful

analysis of the evidence. Appellants have even mischaracterized the very nature of the evidence itself.

The principal constitutional issue in this case is not "legislative good faith" or the absence thereof, as claimed by appellants, but equal representation for equal numbers of people. This issue has been thoroughly dealt with and explained by this Court over the years in a series of cases, beginning with *Wesberry* v. *Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964). More recently, in *Kirkpatrick*, this Court held:

> ". . . the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality . . .
>
> * * *
>
> . . . the command of Art. 1, § 2 . . . permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." 394 U.S. at 530-531, 89 S. Ct. at 1229.

Only a year ago, in *Karcher*, this Court again declared that "absolute population equality" was the "paramount objective of apportionment . . . in the case of congressional districts." — U.S. —, 103 S. Ct. at 2659. This Court then set forth the analysis by which courts should proceed to determine the constitutionality of congressional districting plans:

> "First, the court must consider whether population differences among districts could have been reduced or eliminated altogether by a good faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plain-

> tiffs can establish that the population differences were not the result of a good faith effort to achieve equality the state must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." 103 S. Ct. at 2658.

As is evident from the opinion of the Court below, it faithfully adhered to this analysis in determining that the Ohio districting plan did not meet constitutional standards. The evidence adduced at trial clearly demonstrated that the population variances among the districts could have been reduced or eliminated, and were not the result of any good faith effort to achieve equality.[1] Appellants' claim that such evidence consisted merely of "the opinions of the disgruntled" or "solicited speculations" is totally inaccurate. For example, the Court below observed in its earlier opinion in the case, *Flanagan* v. *Gillmor*, 561 F. Supp. 36, 42 (S.D. Ohio 1982) that "less hurried final action by the Ohio General Assembly would have permitted greater mathematical precision." Indeed, as the Court noted, Edith Woodward, "a Librarian for the Ohio Legislative Service Commission who played a significant role in drafting the new district lines, candidly admitted that with more time a better effort to achieve precise mathematical equality could have been made." *Ibid.* This testimony by Mrs. Woodward was confirmed by that of James Tilling, Clerk of the Ohio Senate, both of whom

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[1] The population variances among congressional districts in this case were virtually identical to those found by this Court in *Karcher* to be impermissible. Under the New Jersey Plan invalidated in *Karcher*, each district, on average, differed from the ideal population figure by .1384%. The Ohio plan at issue in this case had an average deviation from ideal of .14%. In the New Jersey plan, the variation between the most and least populous districts was .6984%; in the Ohio plan at issue here, the maximum variation was .62%.

were directly involved in the process and neither of whom could fairly be described as "disgruntled."

The Court below further found that use of census tracts instead of the smaller census blocks in drawing district lines was a factor contributing to variances among districts. "By utilizing census blocks, a greater degree of mathematical precision was possible." *Ibid.* This conclusion was again supported by the testimony of Mrs. Woodward, who stated that by using census blocks it was possible to reduce variations among districts to something less than 3,000 people, the maximum variation in the present plan. That census blocks were available as a tool in drawing district lines is evidenced by the fact that the Ohio House used census blocks in its version of the plan, and that blocks were used in some instances in the final version approved by both the House and Senate.

Significantly, the Court below also found that variances occurred in the Ohio plan because "mathematical equality was sacrificed for the pursuit of secondary goals" (Jurisdictional Statements App. 16a or A-16). This finding was plainly supported by Mr. Tilling's testimony that districts of precise mathematical equality could have been drawn by the General Assembly if efforts had not been made to pursue such secondary interests as preservation of communities of interest and census tract boundaries. Similarly, Ohio Senate President Paul Gillmor testified that the necessity for legislative compromise may have affected efforts to achieve absolute mathematical equality among the districts.

Because the three-judge panel properly found that the variances among the districts could have been reduced or avoided and were the result of something other than a "good faith effort to achieve equality," the burden then

shifted to appellants under the second prong of the *Karcher* test to justify the variances by proving that each significant variance was necessary to achieve some legitimate goal. As the Court below noted in its opinion, this Court's decisions in *Kirkpatrick* and *Karcher* require that appellants show: (1) that a variation resulted from the legislature's attempt to carry out a legitimate state policy, (2) that the variation was necessary to effectuate the policy, and (3) that the policy was applied consistently throughout the State (J.S. App. 17a or A-19).

Appellants claimed below that the variations in the plan were justified by various State policies: the creation of safe districts for Ohio's only black Representative and only woman Representative, the intention of the legislature to be politically fair, the need for political compromise, and the preservation of communities of interest. However, as the Court below correctly noted in its opinion, the record is completely devoid of any evidence that the pursuit of these "policies" caused the particular variations, that the variations were necessary to effectuate the policies, or that the policies were applied consistently throughout the State (J.S. App. 19a-23a or A21-A26). Therefore, the three-judge panel was compelled by this Court's decision in *Karcher* to find that appellants had not met their burden of justifying the variances, and that the plan was therefore unconstitutional.

Nevertheless, appellant Celeste claims in his jurisdictional statement that the Court below erred in requiring appellants to justify every variance, no matter how significant, on the basis of the same legitimate state interest. While the Court's opinion plainly indicates that appellants were not required to justify *every* variance on the basis of the same interest (J.S. App. 18a or A-20), the

issue is moot in any event because appellants clearly failed to justify *any*. Furthermore, the requirement that variances be justified on the basis of policy applied consistently throughout the State did not originate with the Court below; it was first imposed by this Court in *Kirkpatrick*, where the justifications offered for the variances in the Missouri plan were rejected because they were not:

> ". . . thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner." 394 U.S. at 535, 89 S. Ct. at 1231.

The evidence clearly supports the district court's conclusions that the population variances in the Ohio plan could have been reduced or eliminated altogether by a good faith effort to achieve population equality, and that the variances were not justified on the basis of some legitimate State objective. For this reason, appellants have chosen to focus their appeal on the district court's interpretation of the phrase "good faith;" they in essence argue that where the legislative leaders have collectively claimed that they acted in good faith in preparing the districting plan and achieving population equality, the first step of the *Karcher* plan has been satisfied and the districting plan must be approved even though wholly avoidable variances among districts are present.

Such an argument totally ignores the fact that this Court's decisions have, for over fifteen years, reflected the principle that the "paramount objective of apportionment . . . in the case of Congressional districts" is "absolute population equality," not the subjective good faith claims of the legislative leaders responsible for districting plans, *Karcher*, — U.S. —, 103 S. Ct. at 2657. Indeed, in *Mahan* v. *Howell*, 410 U.S. 315, 322, 93 S. Ct. 979, 984 (1973), this Court described "population alone" as "the

sole criterion of constitutionality in congressional districting under Art. 1, § 2."

It is for this reason, as the Court below correctly stated, that "numerical considerations, i.e., mathematical equality, are of primary significance" in determining whether the first prong of the *Karcher* test has been met (J.S. App. 11a or A-12). In fact, in *Kirkpatrick*, this Court's finding that the variances in the Missouri plan were avoidable disposed of the good faith issue. As this Court then observed:

> "The New York plan of regions divided into districts of almost absolute population equality described in *Wells* v. *Rockefeller* . . . provides striking evidence that a state legislature which tries can achieve almost complete numerical equality among all the State's districts." 394 U.S. at 532, 89 S. Ct. at 1229 (citations omitted).

That observation in *Kirkpatrick* was echoed by the conclusion of the Court below:

> ". . . had the legislature exercised the kind of good faith effort to achieve population equality required by the Supreme Court, it would have been able to come significantly closer to that goal than it did." (J.S. App. 15a or A-15).

Thus, the Court below did not "break new ground" by declaring that "when population variances can be reduced and those variances are not unavoidable, then there is an absence of good faith in that special sense in which *Karcher* and *Kirkpatrick* use that phrase" (J.S. App. 14a or A-15). The Court below merely restated a principle that has been followed consistently by this Court since *Kirkpatrick* was first decided. Adherence to such a principle is essential, unless the objective of population equality is to become meaningless. This is evidenced by the jurisdictional state-

ment of appellant Brown, where it is suggested that "a *bona fide* effort to achieve population equality" had been made, even though such effort resulted in population variances that could have been avoided "with greater care, time and resources." (J.S. p. 8) This is precisely the kind of argument rejected by this Court in *Kirkpatrick*, and it need not be considered by this Court again.

CONCLUSION

In concluding that the population variances among congressional districts in the Ohio plan did not meet the "equal representation" standard of Article 1, § 2 of the United States Constitution, the Court below faithfully adhered to and applied the standards set forth by this Court in both *Kirkpatrick* and *Karcher*. These appeals raise no issues warranting review by this Court, and the lower Court's decision should therefore be affirmed.

Respectfully submitted,

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FILED
MAY 11 1984
ALEXANDER L. STEVAS,
CLERK

83-1677
83-1678
No. 83-1679

Supreme Court of the United States

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On Appeal From The United States District Court For The Southern District of Ohio

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MOTION OF APPELLEES GARY M. STARR, et al., TO AFFIRM

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QUESTIONS PRESENTED

1. Whether appellants' contention that the test of good faith to be applied to efforts to obtain equality in a Congressional Reapportionment Plan is a subjective one which includes within it the idea of political compromise is so unsubstantial as to not need further argument.

2. Whether appellants' contention that the lower court had constitutionalized the Census Block as the unit of population measurement required to be used in Congressional apportionment is so unsubstantial as to not need further argument.

3. Whether appellants' failure to present any consistent justification, other than political expedience, for variations in population among the districts renders their contention that the trial court erred in interpreting the constitutional standard to require each variation to be justified as necessary in order to effectuate legitimate state policy, consistently applied, so unsubstantial as not to need further argument.

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MOTION TO AFFIRM

Appellees Gary M. Starr, Raymond J. Wohl, Richard R. Mackay, James J. Modarelli, Beryl E. Rothschild, Jeffrey H. Freidman, M. David Fredman, Leonard Davis, Alan Rutsky, Leonard Vannice, Richard Damiani, Thomas Longo, respectfully move this Court, pursuant to Rule 16.1(c) to affirm the judgment of the three-judge United States District Court for the Southern District of Ohio on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument.

DECISIONS BELOW

This action was adjudicated below in two opinions. The first is reported as *Flanagan v. Gillmor* at 561 F. Supp. 36, and was rendered May 25, 1982. The second decision rendered January 30, 1984 (Appendix), is unreported.

CONSTITUTIONAL PROVISION

Article I, § 2 United States Constitution provides in relevant part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . . Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .

STATEMENT OF THE CASE

As a result of the 1980 census, Ohio lost two of its seats in the United States House of Representatives, reducing its number of representatives from twenty-three to twenty-one.

It, therefore, was necessary to reapportion the State into two fewer Congressional Districts than existed previously. A redistricting bill (H.B. 20) was introduced into the Ohio House of Representatives on January 8, 1981. No further action was taken for over a year. Subsequently, on January 27, 1982, the Committee to which it had been referred reported out Amended Substitute House Bill 20, which was approved by the House on the same day. The House, at that time, was controlled by a Democratic party majority.

The Senate, controlled by a Republican party majority, thereafter, on February 17, 1982 passed a different version

of the act. Because of the differences in the House and Senate versions of the bill, it was referred to a Conference Committee, which on March 24, 1982, approved a compromise measure which the Governor signed into law on March 25, 1982. The bill, as enacted, was a midnight effort on the part of the Conference Committee in that the filing date for 1982 Congressional elections was March 24, 1982. The bill extended the deadline for such filings until April 5, 1982. On April 5, 1982, a further Bill (H.B. 953) correcting errors in H.B. 20 was enacted. The apportionment plan thus enacted is hereinafter sometimes referred to as the "Ohio Plan".

Prior to the passage of H.B. 20, on February 16, 1982, Patrick A. Flanagan, a Montgomery County resident, and Ann Butler, a Franklin County resident, filed a complaint on behalf of all citizens and electors of the State of Ohio who are qualified to vote for candidates for election to the United States House of Representatives alleging that the Ohio General Assembly had failed to enact a law creating the required 21 Congressional districts and requested the Court to establish a constitutional redistricting plan. On March 15, 1982, the United States Court of Appeals for the Sixth Circuit designated a three judge panel to hear and determine the action.

On March 26, 1982, Juanita C. Brandon and Rose Marie Higenbottam, Franklin County residents, filed a motion to intervene in the action which was granted on April 6, 1982. The complaint in intervention alleged that the redistricting plan contained in H.B. 20 violated constitutional principles in that, contrary to the one-person-one-vote principle, the new districts unjustifiably deviated from the "ideal" population for Congressional districts; and in that certain of the new Congressional districts had been drawn so as to purposely dilute and deny the voting rights of Ohio's black citizens contrary to the Fourteenth and Fifteenth Amendments to the United States Constitution.

On April 14, 1982, a number of Cuyahoga County residents moved to intervene as defendants in the action. The Court also determined that this action should proceed on behalf of a class of citizens and electors of the State of Ohio who are qualified to vote for candidates for election to the United States House of Representatives.

Pursuant to a stipulation of dismissal filed on April 19, 1982, all defendants except the Governor and the Secretary of State were dismissed as defendants.

On March 26, 1982, Gary W. Starr, Raymond J. Wohl, Frank D. Castelli, and John Kavlich filed a complaint against the Governor and the Secretary of State of Ohio in the United States District Court for the Northern District of Ohio alleging that the redistricting plan violated the one-person-one-vote principle required by the United States Constitution. They further claimed that the Plan created "crazy quilt U.S. Congressional districts in Cuyahoga County, Ohio," for the purpose of protecting the seats of two members of the House of Representatives from the Cuyahoga County area. Plaintiffs asserted that the new Congressional districts violated a claimed constitutional right to "unity of interest" and "convenience of access."

On April 2, 1982, an amended complaint was filed in the Northern District action adding as additional plaintiffs certain residents of Middleburg Heights and University Heights, Ohio. In addition to the allegations of the original complaint, the amended complaint alleged that the new Congressional districts fragmented existing political subdivisions through obvious political gerrymandering.

On April 9, 1982, a number of electors from the newly created 21st Congressional District moved to intervene as defendants in the Northern District action. In an order dated April 13, 1982, the three-judge District Court in the Northern District granted the motion to intervene as defendants and transferred the Northern District action to

the Southern District for the purpose of consolidation with the case pending in that district. The cases were consolidated and were tried on April 19–21, 1982.

At the trial it was agreed that the ideal size for each of the twenty-one Congressional Districts in Ohio is 514,173. This was based on the 1980 Census establishing 10,797,639 as the population of Ohio. In the Ohio Plan all Districts vary from the ideal, the largest deviation being 1,694 (District 1) and the smallest 16 (District 5). The maximum variation is 3,161 (between District 1 and District 7).

Evidence was presented that a plan could have been devised with a greater degree of mathematical accuracy than that contained in the Ohio Plan. According to witnesses, this could have been achieved in part by a more extensive use of census blocks, a smaller unit of measurement than the census tracts generally utilized in the plan.

In addition, there was testimony that with more time a better effort to achieve precise mathematical equality could have been made.

The evidence at trial further established that the Ohio Plan was primarily inspired by political (rather than mathematical or practical) considerations. Although the legislators who appeared as witnesses testified that they were generally aware of the one-man-one-vote rule, their political concerns were more immediate.

On May 25, 1982, the three-judge court, in an order and opinion filed May 25, 1982, reported at 561 F. Supp 36, concluded that the plaintiffs had "failed to prove that Ohio's black citizens were the victims of purposeful discrimination in the drawing of Congressional District lines" in the Ohio Plan, but held in abeyance, "the issue of whether the new plan is consistent with the *Kirkpatrick* 394 U.S. 526 (1968) requirement of precise mathematical equity" pending the United States Supreme Court's decision in *Karcher v. Daggett* 103 S.Ct. 2653 (1983).

At the same time, the court denied plaintiffs' request that it enjoin the use of the Ohio Plan districts for the 1982 election schedule using the Ohio Plan districts.

On January 30, 1984, the three-judge panel rendered an opinion holding that the Ohio Plan violated Article I, § 2 of the United States Constitution. In so holding the district court held that *Karcher v. Daggett* had established the following test for reviewing the constitutionality of Congressional redistricting plans:

> First, the court must determine whether plaintiffs, opponents of the plan, have sustained their burden of proving population variances which could have been reduced or eliminated by a good faith effort. If, and only if, the plaintiff sustains this initial burden, must the Court move on to the second inquiry or level of analysis. At this stage, the state must bear the burden of proving that "each significant variance" was necessary to achieve some legitimate goal. (Appendix at 11a)

The court then held that opponents of a plan must meet their burden by showing that population variances among districts were not unavoidable and that the variances could have been reduced by a good faith effort. The court held the good faith, required by this rule, to be missing "when population variances can be reduced and those variances are not unavoidable." (Appendix at 14a). The court further held that equality not having been achieved the defendants had not justified the variances in the Plan. In its Order, the court required that a revised plan be presented to the court within forty-five (45) days.

In response to various motions filed by defendants on February 13, 1984, the court denied reconsideration and modified its earlier order to specify that the 1984 elections under the Plan were enjoined. The defendants thereafter

appealed to this court, after which the District Court stayed its order enjoining the 1984 elections under the Plan. As a result it is likely that Congressional elections in Ohio will be held for a second time under a Congressional Apportionment Plan which is unconstitutional.

ARGUMENT

Appellants contend that the District Court erred in holding the Ohio Plan unconstitutional on the basis of what the appellants believe is a misinterpretation of both the good faith and the justification standards set forth in *Karcher v. Daggett*, 103 S. Ct. 2653 (1983). Appellants also contend that the court has erroneously mandated the use of census blocks in Congressional redistricting as a constitutional requirement.

There can be no question from the record in this case, as set forth in the court's respective opinions below, that the population variances contained in the Ohio Plan were neither unavoidable nor justified. Nor is there any support for appellants' contention that the lower court has "constitutionalized" the use of census blocks in developing Congressional districts.

I. The District Court properly ruled that population deviations created by the redistricting plan adopted by the Ohio General Assembly were not unavoidable.

In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1968), this Court interpreted Article I, § 2, of the United States Constitution as establishing a rule of mathematical equality in apportionment. The Court said:

> Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the command of

> Art. I, § 2 that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite good faith effort to achieve absolute equality, or for which justification is shown. 394 U.S. at 531.

In *Karcher v. Daggett, supra* the Supreme Court reaffirmed this interpretation. It dispelled any belief that the standard established in *Kirkpatrick v. Preisler, supra*, encompassed any *de minimis* exceptions. In *Karcher*, this Court set forth a two-part test to apply in each case, to wit: Those objecting to the plan must show that, "the population differences among districts could have been reduced or eliminated altogether by a good faith effort to draw districts of equal population." If the objectors can establish that such differences are, "not the result of a good faith effort to achieve equality, the state must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal,". 103 S.Ct. at 2658.

The principal issue in this case is the interpretation of "good faith" used in the above test. Appellants contend that "good faith" in this context encompasses legislative compromise and requires only that the legislature shall have acted in "subjective good faith." They argued to the District Court and argue here again, that what is required is that those who challenge the plan must bear the burden of proving that the legislators acted in "bad faith". The District Court rejected this argument. In holding the Ohio Plan to be unconstitutional, the three-judge panel unanimously held that "good faith" is to be established by an objective test. The Court held: "When population variances can be reduced and variances are not unavoidable, then there is an absence of good faith in the special sense in which *Karcher* and *Kirkpatrick* used that phrase." *Flanagan v. Gillmor*, (Appendix at 14a).

Other lower courts interpreting the Supreme Court cases have also accepted the objective interpretation. *See Doulin v. White*, 528 F. Supp. 1323 (E.D. Ark. 1982) and *Latino Political Action Committee v. City of Boston*, 568 F. Supp. 1012 (D. Mass. 1983), application for stay pending appeal denied 716 F.2d 68 (1st Cir. 1983), application for stay pending petition for cert. denied sub nom. *Bellotti v. Latino Political Action Committee*, 104 S.Ct. 5 (1983).

The District Court correctly applied the test established in the *Karcher* and *Kirkpatrick* cases to the case at bar. The court's holding that the Ohio Plan countervenes Article I, § 2, of the United States Constitution is fully supported. Uncontroverted evidence in the record indicates that the legislature's failure to attain equality was based on the hurried manner in which the plan was adopted, the unit of measurement used and the dictates of political compromise. The trial court concluded:

> . . . the difficulty arose in this case, as in many others, when the legislature tried to achieve population equality while concurrently pursuing secondary goals. Pursuit of secondary goals will often result in variances where such variances might otherwise not exist. That is precisely what appears to have happened in this case. (Appendix at 15a)

The record supports the Court's conclusion: all of the witnesses testified to the speed at which the Plan was conceived and the non-numerical considerations which dictated its final form. For example, Edith Woodward, an employee of the Legislative Service Commission, testified that in most cases her instructions concerned the number in a particular part of a district, not to hit the ideal number and that with more time she could have come closer to the ideal figure. Senator Meshel also testified that a plan could have been drawn much more closely aligned in equal population amounts.

Senator Gillmor testified that the Conference Committee could not have drawn a plan with less deviation that

would have passed the General Assembly and that the necessity for legislative compromise had an effect on efforts for absolute equality, and Senator Meshel evidenced his concern as to the procedures used and the methods used by the participants with too many clandestine meetings and not enough open meetings and participation by all parties involved. Other witnesses testified that no particular consideration was given to the issue of mathematical precision whatever.

The Court made it clear that it would have preferred a different result but that plaintiffs had in fact established that the variations among districts in the Ohio Plan were not unavoidable.

II. The District Court was correct in considering the use of census blocks as evidence that these population variances were not unavoidable.

Appellants contend that the Court in finding that greater equality might have been achieved by the use of census blocks has "constitutionalized the census block as the unit of population measurement required to be used in Congressional redistricting." This argument is specious. The court below correctly found that the legislature could have come closer to the ideal by a more extensive use of census blocks. It also could probably have come closer to the ideal had the Legislative Service Commission been furnished a computer instead of an adding machine. In so holding, it rejected appellants' arguments that the use of census tracts rather than census blocks dictated the variations in districts and were necessary in that smaller units of measurement are less reliable. This argument is no different from the argument rejected in *Karcher v. Daggett*, that a plan is, "*per se* a product of a good faith effort to achieve population equality because the maximum population deviation among districts is smaller than the predictable undercount in available census data." 103 S. Ct. at 2661.

The use of this evidence does not as a matter of logic dictate that census blocks and no other method may be used in order to obtain the required equality of population. The court simply held that the legislature must use whatever available measure was necessary to accomplish the desired end.

III. The District Court was correct in holding that variances in population from district to district were not justified by legitimate state interest.

It having concluded that the Redistricting Plan contained variances which were avoidable by a good faith effort to achieve population equality, the Court went on to apply the second level of inquiry with respect to justification of variances. The lower court interpreted the Supreme Court requirements as stated in *Karcher v. Daggett*, *supra*, to be:

> The state must show (1) that a variation resulted from the legislature's attempt to carry out a legitimate state policy; (2) that the variation was necessary in order to effectuate the policy; and (3) that the policy was applied consistently throughout the state. (Appendix at 18a)

Appellants claimed justification for the Ohio Plan's failure to attain mathematical precision were alleged political fairness, preserving the constituencies of Ohio's only black representative and only woman representative, preserving communities of interest and political compromise. The lower court carefully reviewed each of these justifications. Although it conceded that such justifications other than "political compromise" could constitute a legitimate justification, in no case did it find that the State had carried its burden of proving that such justification was in fact the reason for the deviation, or that it was either necessary or consistently applied.

At the trial appellants made little attempt to justify the variances which had occurred in the Plan other than the claimed justification of preserving safe seats for Representatives Oakar and Stokes, all attempts at justification were in fact an application of hindsight. The appellants, moreover, concede that no justification was consistently applied from district to district.

Appellants, however, contend that the court's holding that each variance must be justified and that variances must be consistently maintained throughout, is not in keeping with the ruling in *Karcher, supra*. Appellants further maintain that if justification were needed there was a legitimate State interest behind each variance although not always the same legitimate interest.

The District Court was clearly correct in its application of the rules with respect to justification. The situation fits precisely the plain language of this Court in *Karcher v. Daggett* where it ruled:

> The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified required case-by-case attention to these factors.
>
> The possibility that a State could justify small variations in the census-based population of its congressional districts on the basis of some legitimate, consistently applied policy was recognized in *Kirkpatrick* itself . . . *We rejected its arguments* not because those factors were impermissible considerations in the apportionment process, but rather because of the size of

the resulting deviations and *because Missouri* "[a]t best . . . *made haphazard adjustments to a scheme based on total population," made "no attempt" to account for the same factors in all districts, and generally failed to document its findings thoroughly and apply them "throughout the State in a systematic, not an ad hoc manner."* . . .

At argument before the District Court and on appeal in this Court, appellants emphasized only one justification for the Feldman Plan's population deviations — preserving the voting strength of racial minority groups. . . .

Nowhere do appellants suggest that the large population of the Fourth District was necessary to preserve minority voting strength; in fact, the deviation between the Fourth District and other districts has the effect of diluting the votes of all residents of that district, including members of racial minorities, as compared with other districts with fewer minority voters. The record is completely silent on the relationship between preserving minority voting strength and the small populations of the Third and Sixth Districts. Therefore, the District Court's findings easily pass the "clearly erroneous" test. 103 S. Ct. at 2663-2664. (emphasis supplied).

This Court made it clear that the State must be able to show that each variance is justifiable on a consistent basis. The three-judge court adopted that rule and applied it correctly.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Southern District of Ohio should be affirmed.

Respectfully submitted

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Dated: May 11, 1984

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Patrick A. Flanagan, et al.,
Plaintiffs
v.
Paul E. Gillmor, et al.,
Defendants
} Case No. C-2-82-173

Gary M. Starr. et al,
Plaintiffs
v.
James A. Rhodes, Governor,
State of Ohio, et al.,
Defendants
} Case No. C-2-82-394

ORDER

(Filed January 30, 1084)

In accordance with an opinion simultaneously filed herein and for the reasons therein stated, the Court concludes that plaintiffs have sustained their burden of proving that the Ohio Plan does not meet the "equal representation" standard of Article I, § 2 of the Constitution of the United States. A revised plan for Congressional redistricting which satisfies the requirement of Article

I, § 2 should be forwarded to this Court for review within forty-five (45) days of the date of this order.

BY ORDER OF THE COURT

/s/ NATHANIEL R. JONES,
Circuit Judge

/s/ JOSEPH P. KINNEARY,
District Judge

/s/ ROBERT M. DUNCAN,
District Judge

January 30, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Patrick A. Flanagan, et al.,
Plaintiffs
v.
Paul E. Gillmor, et al.,
Defendants
} Case No. C-2-82-173

Gary M. Starr, et al.,
Plaintiffs
v.
James A. Rhodes, Governor, State of Ohio, et al.,
Defendants
} Case No. C-2-82-394

OPINION

(Filed January 30, 1984)

Before Nathaniel R. Jones, Judge, United States Court of Appeals for the Sixth Circuit; Joseph P. Kinneary, United States District Judge; and Robert M. Duncan, United States District Judge.

Duncan, District Judge. This is our second occasion to judicially review the State of Ohio's Congressional redistricting plan (Ohio Plan) which effectively became law on March 25, 1982.[1] By an order dated May 25, 1982, we

[1] In 1981 a Congressional redistricting plan, House Bill 20, was introduced in the Ohio House of Representatives. After the House passed the bill on January 27, 1982, the Senate passed an amended version on February 17, 1982. At that time the legislature was facing a statutory time deadline of March 24, 1982, when petitions of candidacy for Congress had to be filed. A compromise was reached by a Conference Committee; the compromise bill was enacted and signed into law by the Governor on March 25, 1982. The enactment contained a provision postponing the petition-filing deadline until April 5, 1982. Subsequently, because of a number of errors in H.B. 20, a corrective measure, H.B. 963, was enacted and became effective April 5, 1982.

decided not to enjoin use of the plan for the upcoming Congressional election and stated that:

> We accordingly will hold in abeyance the issue of whether the Ohio plan satisfies the mathematical precision of *Kirkpatrick, supra [Kirkpatrick v. Preisler*, 394 U.S. 526, 533-34 (1969)] until we have the benefit of the Supreme Court's decision in the New Jersey case.

Flanagan v. *Gillmor*, 561 F. Supp. 36, 50 (S.D. Ohio, E.D. 1982).

On June 22, 1983, the Supreme Court of the United States decided the case *Karcher, Speaker, New Jersey Assembly, et al.* v. *Daggett, et al.*, —— U.S. ——, 51 U.S.L.W. 4953 (1983). The Supreme Court held unconstitutional a congressional reapportionment plan enacted by the New Jersey Legislature after the 1980 census.

After receiving certain additional 1980 census material, reading counsels' memoranda, hearing argument, and carefully considering the Ohio Plan in light of the precedential congressional redistricting requirements set forth in the *Karcher* case, we determine that the Ohio Plan fails to meet the "equal representation" standard of Article I, § 2 of the Constitution of the United States.

I

The facts of the case essentially remain unchanged from those set forth in *Flanagan, supra*. Rather than repeat them herein, a historical summary will do.

The Parties

Case No. C-2-82-173 was filed February 16, 1982, in this Court as a class action by named plaintiffs Patrick A. Flanagan and Ann Butler. They claimed that the Ohio General Assembly had failed to enact a congressional

redistricting plan and requested the Court to establish a plan. Meanwhile the Ohio Plan was adopted. Those named plaintiffs now argue that the Ohio Plan is constitutional. (See Brief of Plaintiffs Patrick A. Flanagan and Ann Butler in Support of Present Ohio Congressional Redistricting Plan.)

Next in March 1982, Juanita C. Brandon and Rose Marie Higenbottam moved to intervene in Case No. C-2-82-173 in a styled class action attacking the constitutionality of the plan. They vigorously continue the attack.

A number of Cuyahoga County residents were granted intervention as defendants. They support the lawfulness of the plan.

Gary W. Starr, Raymond J. Wohl, Frank D. Castelli, and John Kavlich filed an action in the United States District Court for the Northern District of Ohio seeking to have the plan declared unconstitutional (Case No. C-2-83-394). That complaint was amended and additional plaintiffs were added. A number of electors of the 21st Congressional District intervened as party defendants. The case was transferred to this District and consolidated with Case No. C-2-82-173. The *Starr* plaintiffs and defendants have not altered their positions concerning the constitutionality of the Ohio Plan.

The defendants in both cases are the current Governor and Secretary of the State of Ohio.

In the discussion hereinafter, plaintiff-intervenors in the *Flanagan* case and plaintiffs and plaintiff-intervenors in the *Starr* case will be referred to as plaintiffs. Defendants and defendant-intervenors in both cases will be called defendants.

The Ohio Plan

According to the 1980 census, the Ohio population is 10,797,630. The ideal population for each of Ohio's 21 Congressional districts is 514,193. All districts deviate from this ideal number. The average deviation from the ideal is .14%. Six districts have a percentage deviation of .20% or more; fifteen districts have a percentage deviation of .10% or more. District 1 has a population of 515,863, which is 1,694 above the ideal or +.33%. District 7 has a population of 512,706, 1,467 below the ideal or —.29%. The range of deviation between the two districts is .62%, referred to as the total percentage deviation.[2]

The General Assembly had other plans before it. None of them had a lower total percentage deviation, but two of them were better than the final plan regarding average percentage deviation. Earlier this Court concluded that "the plan as enacted compares favorably to the other proposed plans. *Flanagan, supra*, p. 42.

Deviations from the Ideal

At the time of the enactment of the Ohio Plan, the Ohio House of Representatives was controlled by a majority of Democrats, while the Senate was controlled by a

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[2] Certain factual similarities between the New Jersey case and the Ohio case are undeniable. In the New Jersey case, following the 1980 census, New Jersey lost one seat in the House of Representatives. After two unsuccessful attempts at redistricting, the legislature for the State of New Jersey convened and "swiftly" passed a bill introduced by Senator Feldman, president pro tem of the State Senate. Under the Feldman Plan, as the New Jersey plan came to be known, the average variance among districts was .1384% or about 726 people. Under the Ohio Plan, which was also drafted after the 1980 census, the average variance among districts was .14% In the New Jersey Plan, the variation between the most and least populous districts was .6884% or 3,674 people. In the Ohio Plan, the population difference between the largest and smallest districts was 3,161, *i.e.*, a maximum variation of .62%.

majority of Republicans. Obviously, a bipartisan accord was necessary to pass the legislation.

Senate Majority Leader Gillmor, Speaker of the House Riffe, and Representative Stinziano all testified, in essence, of their awareness of and sensitivity to a requirement that the districts be balanced in population and as close to the ideal number as possible.[3] However, Senator Meshel, Senate Minority Leader, testified that a plan could have been drawn "a lot more closely aligned in equal population." (Meshel Tr. 7-9.)

Edith Woodward, an employee of the Ohio Legislative Service Commission, worked on the preparation of the redistricting plan. She stated that her effort was to plan each district to have a population of 514,173 or as close to that figure as practicable. She was not told by any member of the General Assembly that there was any permissible fixed deviation. However, as we stated in our earlier opinion, Ms. Woodward admitted that with more time a better effort to achieve precise mathematical equality could have been made. *Flanagan, supra*, p. 42.

For the most part larger unit census tracts rather than smaller census blocks were used in preparation of the plan. Use of census blocks could have reduced the extent of a number of variances from the ideal.

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[3] For example, Senator Gillmor testified: (Gillmor Tr. 4)

Q. Did you understand that the only variances from the mathematical equality of zero deviation are these that are unavoidable despite a good faith effort to achieve absolute equality or for which justification is shown?

A. It was our feeling that we had to get down to zero if it were possible, yes.

However, Gillmor also stated: (Gillmor Tr. 4)

Q. I take it then that your answer is yes, the necessity for legislative compromise did have an effect on efforts to achieve absolute equality among the districts. Is that correct?

A. I suppose it may have.

The Ohio General Assembly's efforts to achieve mathematical parity were effected by a number of influences. The omnipresent reality of political compromise surely had a causal relationship to the result. The legislature, in enacting the plan, made efforts to "preserve the core of existing Congressional districts, to achieve relative geographical compactness, and to preserve the political complexion of the districts of incumbent members of the Congressional delegation." *Flanagan, supra*, p. 42. The Ohio Plan was also designed to maintain favorable district constituencies for Representative Louis Stokes, Ohio's only black member of Congress, and Representative Rose Oakar, the only woman member of Congress from Ohio.

In our earlier opinion we found that the legislature could have attained greater precision, and that the variances from the numerical ideal were not shown to be unavoidable. *Flanagan, supra*, p. 47.

Race-Religion

Plaintiff-intervenors contended that the Ohio Plan was purposely designed to dilute the voting strength of Ohio's black citizens. The evidence focused on the black populations in Franklin, Hamilton and Cuyahoga Counties. The May 25, 1982 opinion thoroughly discusses this issue. *Flanagan, supra*, pp. 42-46. In sum, we determined that the evidence fails to establish an invidiously discriminatory racial motive accounting in whole or in part for the districts' boundaries. We previously had occasion to note that if the General Assembly, in enacting a redistricting plan, uses racial demography as a factor in considering the political complexion of a district, and the result is a significant diminution of black voting power, we would be concerned about the lawfulness of such a plan. Under such circumstances a permissible inference of purposeful discrimination could be drawn. *See Flanagan, supra*, n. 39.

Finally, we earlier decided that there were insufficient proofs that in dividing the 19th from the 21st District in part between the two census tracts which together include University Heights, the General Assembly was animated by a purpose to dilute the ability of voters to organize along religious or racial lines. *Flanagan, supra,* p. 46.

II

As this Court noted in its prior opinion and as the Supreme Court noted in *Karcher*, Article I, § 2 establishes a high standard of "justice and common sense" for the apportionment of congressional districts: "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (footnote omitted). This principle of "equal representation" was defined with greater specificity in the seminal case of *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) when the Supreme Court was faced with a challenge to a Missouri redistricting plan.

In finding the deviations in *Kirkpatrick* unacceptable, the Supreme Court noted that

> [T]he "as nearly as practicable" standard requires that the state make a good faith effort to achieve precise mathematical equality . . . .
>
> Unless population variances among congressional districts are shown to have resulted despite such effort, the state must justify each variance, no matter how small.

Kirkpatrick, supra, pp. 530-31.

Therefore, under the rule enunciated in *Kirkpatrick*, "only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown . . . ." are permissible. *Id.* at 531.

Since the Supreme Court's decision in *Kirkpatrick*, the need to satisfy the mandate of Article I, § 2 for mathematical equality among districts has engendered additional

litigation. Without engaging in an exhaustive analysis of all the precedents concerning reapportionment of congressional districts, the Court notes that the most recent plurality decision of the Supreme Court in *Karcher v. Daggett* provides this Court with additional guidance on this question.[4] In *Karcher*, the Supreme Court set forth the analysis which must be engaged in by a court reviewing the constitutionality of a dedistricting plan.

> First, the court must consider whether population differences among districts could have been reduced or eliminated altogether by a good faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good faith effort to achieve equality the state must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

Karcher, supra, p. ——.

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[4] This Court has already indicated that there are a number of similarities between the Ohio and the New Jersey Plans. Despite these similarities, the proponents of the Ohio Plan argue that there are dissimilarities between the two cases that allow the Ohio Plan to withstand constitutional scrutiny. Specifically, defendants in this case argue that unlike the New Jersey case, where the legislature had a plan with lower deviations to choose from, the Ohio legislature in this case chose the plan with the lowest deviation. While it is true that the Supreme Court in *Karcher* mentions the fact that the New Jersey legislature had before it other plans with smaller deviations, that fact was one fact among many which led the court to conclude that the deviations were not unavoidable; it was not conclusive. Therefore, the fact that there were no other plans under consideration by the Ohio legislature which contained significantly lower deviations does not mean that the plan that was adopted contained deviations which were unavoidable.

As is evident from the above-quoted language, *Karcher* mandates that courts engaged in a constitutional review of congressional redistricting plans employ a two-part analysis. First, the court must determine whether plaintiffs, opponents of the plan, have sustained their burden of proving population variances which could have been reduced or eliminated by a good faith effort. If, and only if, the plaintiff sustains this initial burden, must the Court move on to the second inquiry or level of analysis. At this stage, the state must bear the burden of proving that "each significant variance" was necessary to achieve some legitimate goal. *Id*. For the sake of clarity, the Court will attempt to elucidate what is required under each prong of *Karcher's* two-part analysis.

A. Good Faith

The first prong of the *Karcher* test requires this Court to make a determination as to whether "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Karcher, supra*, p.

In determining what evidence satisfies this first prong of the *Karcher* analysis, this Court has struggled with the "good faith" language of *Karcher* and *Kirkpatrick*. The opponents of the Ohio Plan contend that plaintiffs meet their burden by showing that population variances among districts were not unavoidable and that the variances could have been reduced or eliminated altogether by a good faith effort. Conversely, proponents of the Ohio Plan argue that persons challenging the plan bear the burden of showing that the defendant acted without good faith or with some bad or invidious motive. This Court believes that the opponents of the plan have correctly analyzed *Kirkpatrick* and its progeny.

It is true that at first blush the standard for judging the constitutionality of redistricting plans under Article I, § 2 appears exacting, even harsh for those attempting to draft constitutionally sound redistricting plans. Nonetheless, it would seem that at least with respect to the first prong of the *Karcher-Kirkpatrick* test numerical considerations, *i.e.*, mathematical equality, are of primary significance.

The primary importance of mathematical considerations in congressional redistricting[5] is apparent when one reads the line of cases concerning apportionment in state legislative districts. In explaining the distinction between apportionment of congressional as opposed to state legislative districts, the Supreme Court has had occasion to note that

> Thus, whereas population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, § 2, broader latitude has been afforded states under the equal protection clause in state legislative redistricting.

Mahan v. Howell, 410 U.S. 315, 322 (1973). *Accord Gaffney v. Cumming*, 412 U.S. 735 (1973).

In *White v. Weiser*, 412 U.S. 783, 792 (1973), the Supreme Court reaffirmed the distinction between challenges to congressional districts and challenges to state districts. Interestingly enough, the defendants in *Weiser* also argued that absent proof of invidiousness, population variances did not violate Article I, § 2. The Court rejected

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[5] The primary significance of mathematical equality was apparent even before the Supreme Court decided *Karcher* as is evident by the discussion which follows. *See* pp. 11-13. *infra*. Moreover, this Court in its prior opinion acknowledged the primary importance of numerical considerations when it noted that under Kirkpatrick a finding that a variance is not unavoidable disposed of the issue of good faith. *See Flanagan, supra*, p. 47.

this argument and "reiterated that the *Wesberry*, *Kirkpatrick* and *Wells* line of cases would continue to govern congressional reapportionments, although holding that the *rigor of the rule* of those cases was inappropriate for state reapportionments." *Weiser*, *supra*, p. 793.

This Court believes that support for the exacting definition of "good faith" may initially be found by contrasting the analysis used in those cases challenging state districts with the more stringent analysis used in cases involving congressional districts.

As has already been noted, the proponents of Ohio's plan seem to maintain that the numerical strictures of *Kirkpatrick* and *Karcher* can be avoided in this case because there is evidence that the legislature acted in subjective good faith. In support of their contention, proponents argue that a number of legislative leaders testified unequivocally that the plan in question was in their opinion a reasonable legislative compromise and that efforts were made to achieve population equality. More specifically, the proponents of the Ohio Plan, in support of their subjective good faith argument, contend that the New Jersey Plan, held to be unlawful by the Supreme Court in *Karcher*, is in some significant respects dissimilar to the Ohio Plan. There is no evidence that the Ohio General Assembly enacted the plan on the premise that a deviation lower than the statistical imprecision of the decennial census was the "functional equivalent of mathematical equality" as the District Court found in *Daggett v. Kimmelman*, 535 F. Supp. 978, 982-983 (N.J. 1982).

Nothing in the Court's decision here today is meant to suggest that the Ohio legislature acted with invidious motives. The Court has no reason to doubt that the legislature conducted itself in good faith insofar as it strove to obtain an acceptable political solution to a thorny legal and political problem. Clearly, that solution was a compromise with

which no one was completely enamoured but which dissatisfied the fewest number of people. However, the absence of evidence of the subjective bad intentions of individual legislators is irrelevant. Such evidence is not required to sustain the burden of proof set forth in the first prong of *Karcher*.

The Court concedes that were the question of "good faith" capable of resolution by use of a standard less exacting than that set forth in *Karcher* and *Kirkpatrick*, we would arguably have a closer case. However, this Court concludes, and is not alone in doing so, that good faith as that term is used in *Karcher* and *Kirkpatrick* is tantamount to a term of art having a special meaning. See *Doulin* v. *White*, 528 F. Supp. 1323, 1328-29 (E.D. Ark. 1982).[6] Stated rather simply, when population variances can be reduced and those variances are not unavoidable, then there is an absence of good faith in the special sense in which *Karcher* and *Kirkpatrick* use that phrase.

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[6] In *Doulin* the court sincerly rejected attempts by proponents of Arkansas' redistricting plan to persuade the court that good faith means subjective good faith. This Court finds the reasoning of that court persuasive.

It is possible to argue, of course, that if the plaintiffs' burden is limited to showing "variances which can be reduced and which are not unavoidable" then the term "good faith" is rendered meaningless. This Court believes that the definition of good faith herein adopted is entirely consistent with the Supreme Court's opinion in *Karcher*. While the conclusion that the term good faith is in essence synonymous with proof that population variances could have been reduced and were not unavoidable may render the words "good faith" surplusage, this conclusion does not render the term "good faith" meaningless. Rather it results in a greater specificity of meaning for that term. In this regard it can no longer be the subject of dispute that "at some point . . ., population variances do import invidious devaluation of an individual's vote . . . ." *White* v. *Weiser*, 412 U.S. 783, 792 (1973). This language seems to buttress this Court's conclusion regarding the "good faith" language in the line of cases beginning with *Kirkpatrick* and ending with *Karcher*.

In the case at bar, opponents of the Ohio Plan sagely note that this Court has already concluded that greater precision was possible than that which was achieved by the Ohio Plan. *Flanagan, supra,* p. 47. More specifically, this Court concluded that "the variances were not shown to be unavoidable." *Id.* The court went on to note that this failure to achieve mathematical equality could be attributed to a number of factors including the process of legislative compromise, the unit of measurement used,[7] and the hurried manner in which the plan was adopted. *Id.* at 42.

This Court concluded in its prior opinion and today reaffirms the conclusion that had the legislature exercised the kind of good faith effort to achieve population equality required by the Supreme Court, it would have been able to come significantly closer to that goal than it did. While this Court has no doubt that the legislature was trying to do something in good faith, achieving population equality was not the sole focus of legislative efforts. More specifically, the difficulty arose in this case, as in many others, when the legislature tried to achieve population equality while concurrently pursuing secondary goals. Pursuit of secondary goals will often result in variances where such variances might otherwise not exist. That is precisely what appears to have happened in this case. Specifically, Witness Tilling testified as follows:

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[7] This Court concluded in its original opinion that "census tracts are the larger unit of measurement and census blocks are the smaller. By utilizing census blocks, a greater degree of mathematical precision was possible." *Flanagan, supra,* p. 42. While it is true that the Court also concluded that "[t]he evidence at trial was inconclusive on the issue of whether greater precision could have been obtained solely by reallocation of census tracts . . ." *Id.*, at 42, n.5, the failure to make more frequent use of the smaller unit of measure was one factor which led to the Court's conclusion that the variances were not unavoidable.

Q. Would it have been possible to draw 21 congressional districts with exactly 514,173 people in each of them, using the data that you had available?

A. Not without seriously disrupting the communities of interest which you have asked me about before. They would be decimated by such a process.

Q. But it would have been possible by ignoring that? Is that your testimony?

A. Basically, I guess I am saying that you can do one or the other.

Q. Then it would also have been possible to draw a plan that varied by less than 3100 people among the districts, wouldn't it?

A. Yes, again, if you are willing to disregard communities of interest and census tract boundaries, you could, indeed, do that.

(Tilling Tr. 127-128.) This testimony suggests that mathematical equality was sacrificed for the pursuit of secondary goals. While the Supreme Court has conceded that there may be permissible variances, such variances must be shown by the defendants to be the result of the pursuit of some legitimate goal or policy. Defendants have failed to make the requisite showing in this case. Moreover, this showing is irrelevant to whether the good faith standard of *Karcher* has been satisfied.

Before moving on to an analysis of the secondary goals proffered as basis or justification for population variances in this case, one final related matter deserves to be addressed. The proponents of the Ohio Plan argue that drafters of a redistricting plan may still be held to have acted in good faith even though they pursued secondary political goals. This argument is little more than a restatement of prior arguments. That is, the proponents appear to be arguing that the burden should not shift to them even though there

are "not unavoidable variances" which resulted from the pursuit of legitimate secondary goals provided they are found to have acted in subjective good faith. This argument is rejected by this Court.

Moreover, the Court believes the defendants misconstrue the relevance of the pursuit of secondary non-numerical goals to the question of whether the plaintiffs have met their burden under the first "good faith" prong of the *Karcher* test. The pursuit of secondary non-numerical goals is irrelevant to the first prong "good faith" inquiry as that inquiry has been defined at length in the preceding pages. Generally, consideration of such goals only becomes relevant after the issue of good faith has been resolved and the burden has shifted to the state to justify — not unavoidable variances." The language of *Karcher* supports this conclusion.

> We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives . . . . Nevertheless the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases . . . .

Karcher, supra, p. .

In this same vein, in considering the legitimacy of the particular secondary goal of preserving political subdivisions, the *Karcher* court noted that "while perfectly permissible as a secondary goal, [pursuit of that political goal] is not a sufficient excuse for failing to achieve population equality without the specific showing described *infra* . . . ." *Karcher, supra*, p. , n.5.

Therefore, while the pursuit of secondary objectives is certainly permissible after *Karcher*, the presence or absence of such goals does little to militate in favor of finding

good faith where the Court has found variances which are not unavoidable. Secondary goals must remain secondary; the primary goal must be equality. The pursuit of legitimate goals may be proffered as justification for "not unavoidable variances," however. In that regard, proof of the pursuit of secondary non-numerical goals is more properly considered as part of the state's proof after the burden has shifted.

B. Legitimate Secondary Goals

Upon a determination that a state legislature did not formulate a congressional redistricting plan containing only those variances which were unavoidable despite a good faith effort to achieve population equality, the burden shifts to the state to justify each significant variance. The state must show that a specific deviation from the ideal is necessary in order to achieve a legitimate state policy goal and that the policy is applied consistently throughout the plan. This second level of inquiry requires a three-part analysis with respect to each district which significantly deviates from the ideal. The state must show (1) that a variation resulted from the legislature's attempt to carry out a legitimate state policy; (2) that the variation was necessary in order to effectuate the policy; and (3) that the policy was applied consistently throughout the state.

There is language in *Karcher* to the effect that "the state must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher*, *supra*, p. . The Court does not indicate what is meant by a "significant variance."

Karcher's recent language is somewhat different from the language previously used by the Supreme Court in *Kirkpatrick*. In *Kirkpatrick* the Supreme Court stated that "the state must justify each variance, no matter how small." *Kirkpatrick*, *supra*, pp. 530-31. *Karcher*, on the other hand, requires the state to bear the burden of justifying "each significant variance." *Karcher*, *supra*, at .

After giving this matter careful consideration, we interpret the language of *Karcher* as follows: In determining whether a variance is significant, the court must consider the total plan, the range of the variances from the ideal, and the nature of the goal or goals of the legislature.

This Court's interpretation of significant, as that term is used in *Karcher*, is supported by the following language from that opinion:

> The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the state's interest, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

Karcher, supra, p. .

Given the arguable uncertainty surrounding the meaning of the term "significant variance," and in order to adhere to the true spirit of *Karcher*, the state would be well-advised to be prepared to set forth a basis for each variance.

The Supreme Court has acknowledged that a state may have any number of legitimate concerns which will serve to justify small variances in a redistricting scheme. A state's interest in making districts compact, in respecting municipal boundaries, in preserving cores of prior districts and in avoiding contests between incumbent representatives, have been set forth in *Karcher* as legislative policies which, if applied consistently, and in a non-discriminatory manner, could justify population deviations. *Karcher, supra*, p. .

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8 The court in *Karcher* also noted that some of the policies presented by Missouri in *Kirkpatrick*, which are not presented in this

1. Preserving Minority Voting Strength

Preservation of minority voting strength is another example of a permissible state policy which may justify variances from the ideal. A state's desire to preserve existing minority voting strength is the logical outgrowth of the prohibition against the dilution of that voting strength. The Court has held it constitutionally impermissible to draw congressional districts in a manner which purposely dilutes the voting strength of an identifiable minority. The decision to preserve existing minority voting strength has not been specifically ruled on in the context of a challenge based upon a failure to reach population equality.

In *Karcher*, however, the Supreme Court indicated that the legislative policy of preserving minority voting strength against the potential of dilution provides a legitimate justification for a population deviation, where a "causal relationship" exists between that policy and the deviation. The District Court, in that case, found no such "causal relationship between the goal of preserving minority voting strength . . . and the population variances." *Daggert* v. *Kimmelman*, 535 F. Supp. 978 (D. N.J. 1982). Observing that the record was "completely silent" on that relationship, the Supreme Court concluded that the District Court's findings were not "clearly erroneous." In so

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case, could be legitimate justifications for variances. District-to-district differences in the number of eligible voters, or projected population shift, may in some instances stand.

> We rejected [Missouri's] arguments not because these factors were impermissible considerations in the apportionment process, but rather because of the size of the resulting deviation and because Missouri '[a]t best made . . . haphazard adjustments to a scheme based on total population,' made 'no attempt' to account for the same factors in all districts and generally failed to document its findings thoroughly and apply them 'throughout the state in a systematic, not an ad hoc manner.'

Karcher, *supra*, p. ——— (citations and footnote omitted.)

concluding, however, the Supreme Court suggested that the policy of preserving minority voting strength itself is a legitimate one. That policy therefore provides a legitimate justification for a deviation where the facts indicate that it is causally related to the deviation.

The legitimacy of the preservation of minority voting strength, moreover, has been addressed in connection with the congressional reapportionment of districts subject to the Voting Rights Act of 1965. In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1976), the Court addressed the issue whether racial considerations could be intentionally used in an affirmative manner when reapportioning congressional districts. The Court held that racial criteria may be used in redistricting plans in order to maintain non-white voting strength. *Carey, supra*, at 165-168.

If a state may explicitly use racial criteria in drawing districts in a manner which will maintain the minority voting strength of a community, then, as *Karcher* indicates, it follows that the state may also draw districts in a manner which will preserve minority voting strength where it already exists.

While the state in this case did not attempt to justify the Ohio Plan by arguing the preservation of minority voting strength, the state did claim to justify certain variances on the grounds that it was creating "safe" districts for Ohio's only black Representative and Ohio's only woman Representative. The preservation of safe congressional districts for Representatives Stokes and Oakar in the 21st and 20th districts, respectively, is not only an outgrowth of a policy seeking to preserve minority (protected class) voting strength, but also of an analogous policy of preserving minority representation. Having such representation is important to Ohio's delegation in the Congress. Therefore, the state's goal of preserving safe districts for Representatives Stokes and Oakar is permissible as a justification for necessary small deviations in district population.

Although such a goal is legitimate, the burden remains with the state to show with particularity that certain deviations in the plan were necessary to achieve that goal, and that that goal was applied in a consistent manner throughout the state. There is no evidence before the Court which states, other than in general and conclusory terms, that the only way the state could have achieved the goal in question was to have the variances that appear in this plan.

The Court hastens to add that if upon further consideration of this plan the General Assembly is persuaded, and the state can demonstrate to this Court, that small deviations in connection with this legitimate goal are necessary, then such deviations would certainly comport with the standards of *Karcher*.

2. Political Fairness

Defendants strongly urge upon this Court other justifications for the variances found in the Ohio Plan. Specifically, proponents of the plan argue that to some extent, the population variances were caused by a legislative intent to be politically fair. Generally speaking, it is hard to quarrel with the legitimacy of such a goal. Certainly insofar as this goal reflects a legislative intent to prevent gerrymandering, it is legitimate. *Karcher, supra*, p. n.6. Before the Court may accept this goal as a legitimate justification for variances, however, the state must relate with particularity how each variance furthers such a goal, *i.e.*, the necessity requirement of *Karcher*. The state must further sustain the burden of demonstrating consistent application of the concept of political fairness.

Once again, the record in this case reveals that the state has merely asserted in a general way that political fairness justified the variances present in the Ohio Plan. Stated another way, the state has failed to carry its burden under the second prong of the *Karcher* analysis.

3. Political Compromise

This Court is well aware that the Ohio Plan was enacted only after a political stalemate between the parties had been resolved by a dedicated conference committee. Apart from their contention that the Ohio Plan is politically fair, proponents of Ohio's plan appear to be arguing that in order to pass the Ohio Plan, political compromises or concessions from both political parties were necessary. Proponents seem to further argue that the variances in this case can be explained and justified under *Karcher* because the Ohio Plan was the result of such a compromise.

The Court concludes that the political compromise which occurred in this case was not a prospective goal but rather was a retrospective realization of what happened. While political fairness may be a legitimate goal under *Karcher*, *see* discussion *supra*, political compromise in an effort to achieve that goal is not a permissible consideration under either the first or the second prong of *Karcher*. There simply can be no such thing as a consistently applied policy of *ad hoc* political compromise.

4. Communities of Interest

The defendants seek to justify variances in Districts 11 and 19, and perhaps others, by stating that the legislature was concerned with preserving certain interests. We note that the court in *Kirkpatrick* specifically found that the attempt to "avoid fragmenting areas with distinct economic and social interests, thereby diluting the effective representation of those interests in Congress" was an impermissible justification. *Kirkpatrick*, *supra*, p. 533.

The defendants have not even indicated to the Court what communities of interest they sought to preserve in Districts 11 and 19, much less what interests were being protected with respect to other districts. There has been no evidence presented that the deviations in any district's pop-

ulation was causally related to a policy of preservation of community interests. Even if defendants have strong state policy reasons to protect certain communities of interest, the defendants must still show that those policies could be effectuated only by permitting small variances and that, with respect to a certain type of interest, the policy was implemented and consistently applied throughout the state.

5. Other Legitimate Goals

The legitimate policy interests enumerated in *Karcher* include making districts compact, respecting municipal boundaries, preserving the areas of prior districts, and avoiding contests between incumbent Representatives. In discussing secondary goals in this opinion, we do not intend to imply that no other secondary goals are available to a state to justify small variances. Once again, however, it should be emphasized that if asserted, legitimate policy interests must be proved by the state in accordance with the standard set forth above.

To summarize, we find that the defendants have not sustained "the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher, supra*, p.

III

The primary thrust of *Karcher* is the Supreme Court's insistence that the "equal representation" standard of Article I, § 2 requires that congressional districts be apportioned to achieve population equality as nearly as is practicable. We have concluded that with a good faith effort the Ohio General Assembly practicably could have significantly reduced both the average variations from the ideal as well as the total percentage deviation. We reject a standard to determine primary good faith requiring a judicial attempt

to hone in on the subjective mentality of a bicameral multi-member legislative authority. What the body did, rather than what certain of its leaders said that they were trying to do, is a far more appropriate and realistic inquiry in this matter. It is rather obvious, in this case, that well-intentioned but secondary considerations significantly account for the nature and extent of the variances.

In the first instance a state cannot account for deviations from the ideal district by factoring in well-meant secondary goal considerations, and then argue that plaintiffs have failed to show a lack of good faith in getting as close as practicable to the ideal number. If this were the case, a state would never shoulder the burden of justifying significant variances resulting from the implementation of secondary goals. *Karcher* holds otherwise. Stated another way, if variances were avoidable, implementation of secondary goals cannot make them unavoidable. Moreover, while the New Jersey secondary goals were arguably different from the Ohio goals, in New Jersey, as in this case, the state failed to bear the burden of proving that each significant variance between districts was necessary to achieve the legitimate goals. Additionally, in both the New Jersey and Ohio Plans the secondary goals, which otherwise may have had the promise of legitimacy, fell short of the mark for the reason that the state failed to show that the goal or policy was consistently implemented state-wide. Accordingly, this Court finds that the Ohio Plan, like the New Jersey Plan, fails to meet the standard of Article I, § 2 of the Constitution of the United States.

IV

This Court is firm in its appreciation of the fact that congressional redistricting is a duty of the Ohio General Assembly. Although *Karcher* is to a degree illuminating as to the requirements for constitutionality redistricting remains a very difficult undertaking for the legislature. Im-

portant political considerations are at stake. Nevertheless, it is our expectation that the General Assembly can, with dispatch, present to this Court a revised plan, which comports with the Constitution of the United States. Nothing in this opinion is meant to suggest that the present plan is not amenable to revision or that it is not possible to satisfy the *Karcher* and *Kirkpatrick* requirements by eliminating variances between districts in the present Ohio Plan.

If, and only if, the General Assembly cannot meet its obligation, will this Court be required to provide a plan.

Accordingly, defendants are ORDERED to present the matter to the Ohio General Assembly for its consideration and preparation of a revised plan for congressional redistricting which satisfies the requirements of Article I, § 2 of the Constitution of the United States and other requirements of law. In the event that a plan is not forwarded to this Court for analysis and consideration within 45 days of the date of this order, further action will be taken by the Court.

Nothing in this opinion should be construed as prohibiting the General Assembly from extending the February 23 deadline for filing petitions of candidacy for Congress.

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